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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-2994

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
*Petitioner,*

vs.

PLUMBER'S LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, et al.,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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## INDEX


| | |
|---|---|
| The Opinion of the Court Below | 1 |
| The Motion for Rehearing, or, in the Alternative, to Transfer to the Court en Banc | 9 |
| The Judgment of the Court Below | 29 |
| Order Overruling Motion for Hearing or to Transfer | 30 |
| The Petition for Damages and for an Injunction | 32 |
| Motion to Dismiss and Dissolve Temporary Restraining Order | 38 |
| Findings and Order of Temporary Injunction | 40 |
| Defendant's Answer | 42 |
| Judgment for Damages and Permanent Injunction | 43 |
| Preservation of Plaintiff's Basic Objection to Consideration of Proceedings Before National Labor Relations Board | 48 |
| The Federal Statute Which the Case Involves | 51 |

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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## THE OPINION OF THE COURT BELOW

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Entered May 10, 1971, as follows:

No. 55,543

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

GENE HENDERSON, doing business as HENDERSON PLUMBING & HEATING COMPANY,
Respondent,

vs.

PLUMBERS LOCAL NO. 8, OF THE AMERICAN FEDERATION OF LABOR, et al.,
Appellants.

Appeal from the Circuit Court of Jackson County
The Honorable Harry A. Hall, Judge

Action by plumbing contractor to enjoin picketing by labor organization and for damages resulting from such picketing. Trial court issued injunction and gave plaintiff judgment for $43,172 actual and $500 punitive damages. Defendants appeal.

Plaintiff-respondent, Gene Henderson, is a plumbing contractor in the Kansas City area. At the times here significant, he was a member of the United Contractors Council, an association of contractors. The United Contractors Council had a collective bargaining agreement with District 50 of the United Mine Workers of America. Their agreement provided wages and working conditions for employees of contractor members of the council. Another contractors' organization, the Associated Plumbing Contractors of Kansas City, had a contract covering wages and conditions of employment of their employees with Local Union No. 8 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, one of the defendants-appellants.

While these contracts were in effect, officers of Local No. 8 caused pickets to be placed on jobs where Henderson's employees were working. These pickets, whose activity began on October 22, 1963, carried signs which read as follows:

"NOTICE TO THE PUBLIC

This notice is addressed only to the general public and not to any employee or employer. The employees of

HENDERSON PLUMBING COMPANY

who are performing plumbing work on this job do not receive all of the benefits, such as pensions, health and welfare plans, and other advantages which have been established in this area by Plumbers Local No. 8, A.F.L.-C.I.O. We are not asking for recognition, nor do we desire to represent *their employees*, and we have no dispute with any other *employer*."

Whenever these pickets appeared at a job site, employees of other employers on the job refused to cross the picket lines. The appellants do not here dispute that Henderson lost business as a result. No question as to the amount of loss and damages is here involved.

On October 25, 1963, Henderson, on behalf of United Contractors Council, filed a complaint with the National Labor Relations Board charging Local No. 8 with an unfair labor practice in violation of § 8(b) subsection 7(A) and (C) of the National Labor Relations Act. The complaint was investigated and considered by the Board. On October 31, 1963, the Regional Director advised the Contractors Council that after such investigation: "It does not appear that further proceedings on the charge are warranted because there is insufficient evidence that the Charged Party's picketing is for an object proscribed by Section 8(b) (7) of the Act."

Subsequently, District 50, United Mine Workers, filed complaints with the National Labor Relations Board, charging Local No. 8 with violation of § 8(b) subsection 4(ii) (A) and (B) of the National Labor Relations Act, in that by picketing and other means Local No. 8 attempted to coerce builders to cease doing business with Henderson. On July 8, 1964, the Regional Director of the National Labor Relations Board notified District 50 that, as a result of its investigation of the charges, "* * * it appears that further proceedings are not warranted at this time." The conclusion was based upon inadequacy of evidence to show that the activities of Local No. 8 were violative of the provisions of the National Labor Relations Act relied upon by the complainant.

On June 4, 1964, Henderson filed the petition which provided the basis of the judgment here under review. The petition named Local No. 8 and its members as parties defendant. It charged that the picketing by defendants of places where plaintiff was working was for no lawful purpose and was in furtherance of a conspiracy among the defendants to injure, destroy and otherwise interfere with plaintiff's business. The petition charged that the picketing was unlawful and malicious. It sought damages and an injunction against the allegedly unlawful picketing. A temporary restraining order against the picketing was issued.

Defendants moved to dismiss plaintiff's petition and to dissolve the restraining order on the grounds that the activities of defendants of which the petition complained were either unfair labor practices under § 8(b) of the National Labor Relations Act or protected concerted activity under § 7 of the Act and that, therefore, the court had no jurisdiction of the complaint because of the exclusive primary jurisdiction of the National Labor Relations Board of matters arising under the National Labor Relations Act.

A hearing was held on plaintiff's application for a temporary injunction. At the conclusion of the hearing, the trial court found that plaintiff was not engaged in interstate commerce within the meaning of the National Labor Relations Act, that the acts of defendants complained of do not give rise to a labor dispute within the meaning of said Act, and that, therefore, the court had jurisdiction of the cause. A temporary injunction issued.

Upon a final hearing, the court reiterated its jurisdictional finding, found that the picketing by defendants was "unlawful and in violation of the rights of plaintiff" and constituted "a malicious interference with plaintiff's business." Actual damages to plaintiff in the amount of $43,172 were found and punitive damages of $500 awarded because the acts complained of constituted "a willful and malicious interference with plaintiff's business * * *." The temporary injunction was made permanent. After the motion for new trial had been overruled, defendants appealed.

On this appeal, appellants renew the jurisdictional objections which the trial court overruled. They first challenge the trial court's finding that respondent was not engaged in commerce so as to provide basis for application of the National Labor Relations Act. The evidence showed that Henderson was licensed to do plumbing business in both Missouri and Kansas and, although 98% of his operations were in Missouri, he did four to five thousand dollars worth of business in Kansas in 1963. Henderson also testified that the "great part" of the some $147,000 worth of materials that he purchased in 1963 was manufactured outside the State of Missouri. This evidence would provide basis for a finding in proceedings under the National Labor Relations Act that Henderson was engaged in commerce within the meaning of that Act. National Labor Relations Board v. Denver Building & Con-

struction Trades Council, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284. Furthermore, Henderson was a member of an employers' association which was a party to collective bargaining contracts covering employees of all members of the association. Therefore, the operations of the entire association could be viewed in determining whether or not the particular matters affected commerce. The National Labor Relations Board took such an approach in 1960 in a proceeding involving Local No. 8 and the United Contractors Council and another employer member of the council. Admittedly, the record here includes no attempt to show the extent of the council's business in 1963. However, the fact that the Board had previously found jurisdiction on such basis is of evidentiary value in considering whether the trial court's finding on this issue was erroneous. Also to be considered was the Board's acceptance of the complaint involving the picketing here in question. The Board made no express finding on the jurisdictional issue. However, its dismissal of the complaint was based upon its lack of merit under the National Labor Relations Act, not the fact that interstate commerce was not involved.

In view of the Denver Building & Construction Trades Council case, supra, the finding of the trial court that the matters before it did not involve interstate commerce is contrary to the evidence before the trial court. Inapplicability of the pre-emption doctrine may not rest on such basis.

The authorities cited by respondent on this issue are not convincing. None involves a direct holding under applicable federal law that respondent's operation does not affect commerce within the meaning of the National Labor Relations Act. In view of the Denver Building & Construction Trades Council case, abstract discussion of the difference between interstate and intrastate commerce found in

cases such as Southern Colorado Power Co. v. National Labor Relations Board, 10th Cir., 111 F. 2d 539, and Pueblo Gas & Fuel Co. v. National Labor Relations Board, 10th Cir., 118 F. 2d 304, is not here controlling. In both of those cases, the employer was found to have been in business affecting commerce. Only in National Labor Relations Board v. Shawnee Milling Co., 10th Cir., 184 F. 2d 57, of the cases cited by respondent, was the Board found to have lacked jurisdiction because of the absence of activity affecting commerce. There the employer operated a mill which processed only locally grown crops for exclusively local consumption. In the cases of Heath v. Motion Picture Machine Operators Union No. 170, 365 Mo. 934, 290 S.W. 2d 152, and Quinn v. Buchanan, Mo. Sup., 298 S.W. 2d 413, there was no evidence that the employers there involved were engaged in activities affecting interstate commerce. The presence of such evidence here is the distinguishing feature.

The requirement that the matters involve an employer-employee relationship affecting commerce having been satisifed, is this a case which, by virtue of the National Labor Relations Act, has been removed from state court jurisdiction?

The basic test for determination of this issue is found in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed. 2d 775:

"* * * [W]hen an activity is arguably subject to § 7 or § 8 of the [N.L.R.] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the

Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited and thereby raise the question whether such activity may be regulated by the States."

The so-called "substandard picketing" here involved is activity arguably subject to § 7 or § 8 of the National Labor Relations Act. I.L.A. Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 90 S.Ct. 872, 25 L.Ed. 2d 218; Construction & General Laborers Union v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed. 2d 514. See: Sheet Metal Workers Intl. Assn. v. Florida Heat & Power, Inc., Fla. Sup. Ct., 230 So. 2d 154; Ready-Mix Concrete Co. v. Truck Drivers & Helpers Local Union No. 696, 195 Kan. 154, 403 P. 2d 191; Continental Slip Form Builders, Inc. v. Local Union, 195 Kan. 572, 408 P. 2d 620.

The decisions of the United States Supreme Court on this issue are controlling. Prior cases in this Court, relied upon by respondent, such as Adams Dairy Co. v. Dairy Employees Union, 363 Mo. 182, 250 S.W. 2d 481; 339 S.W. 2d 811; and Adams Dairy, Inc. v. Burke, 293 S.W. 2d 281, are not controlling. The first cited case did not consider the pre-emption doctrine. On the second appeal at 339 S.W. 2d 811, the question of jurisdiction was raised but decided on the basis of lack of evidence of the interstate nature of Adams's business as it was conducted at the time the injunction was issued. Adams Dairy v. Burke, supra, was decided prior to the Supreme Court decision in the second Garmon case, supra, which laid down the principles governing the application of the pre-emption doctrine in cases such as this. Respondent's contention that the matter here does not involve a "labor dispute" within the meaning of the National Labor Relations Act overlooks

the definition of a "labor dispute," found in § 2(9) of the Act as including:

"* * * any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee."

See Continental Slip Form Builders, Inc. v. Local Union, supra, 195 Kan. 576.

The trial court erred in overruling defendants' motion to dismiss for lack of jurisdiction. The judgment is reversed.

Houser, C., Concurs
Higgins, C. Concurs

Robert R. Welborn, Commissioner

PER CURIAM: The foregoing opinion by Welborn, C., is adopted as the opinion of the Court.

Seiler, P.J., Bardgett, J., and Semple, Sp.J., concur; Holman, J., not sitting.

**THE MOTION FOR REHEARING, OR, IN THE ALTERNATIVE, TO TRANSFER TO THE COURT EN BANC**

Said motion was filed in the court below, within the time allowed by law, and on the 22nd day of May, 1971, and is as follows:

Now comes respondent, by his attorneys, and respectfully moves the Court to set aside the Opinion, Judgment and Decree of the Court heretofore rendered herein, and to grant a rehearing of the issues on this appeal; or, in the alternative, to transfer the cause to the Court en banc; and for grounds therefor, Respondent respectfully shows the Court:

I.

**In rejecting the principal contention of Respondent that the facts of this case do not involve a "labor dispute" within the meaning of the National Labor Relations Act, the Court has entirely overlooked, and wholly failed to consider or give effect to the undisputed evidence in the record.**

Among the facts so overlooked by the Court are the following:

1. Plaintiff is under a binding labor contract with *another* labor union (District 50), under the terms of which he was legally bound to deal exclusively, and only, with that union, in "negotiating fixing, maintaining, changing or seeking to arrange terms or conditions of employment" for his employees; the District 50 union being at all times the exclusive bargaining agent for plaintiff's employees, so recognized and accredited by the NLRB. Any attempt by plaintiff, therefore, to deal with defendant union, would directly violate his labor contract and the requirements of the National Labor Relations Act, subjecting him to the penalties of that Act and constituting an unfair labor practice on his part.

2. The defendant union is *not* the bargaining agent for plaintiff's employees, and has no legal right to require plaintiff to deal with it in "negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment" for his employees.

3. The wages being paid to plaintiff's employees at the times of the picketing were substantially *higher* than the wages paid to plumbing employees working for contractors under labor contracts with defendant union. The undisputed evidence is that plumbers employed by plaintiff were receiving $4.39, increased to $4.65 per hour, while plumbers working under defendant union's labor contracts

were receiving $4.20, increased to $4.45 per hour (1st Tr. 79 & 83). Actually, the higher pay enables plaintiff's employees to provide their own insurance rather than depend on so-called "welfare" funds under the control of labor unions. The admissions against interest of defendant's officers Mainey, Cross, wherein they claimed that they were picketing because plaintiff was maintaining "substandard wages and working conditions" (1st Tr. 87 thru 90) was and is patently and palpably false, and was and is used by defendants as an excuse to cover up their *real* purpose of destroying plaintiff's business.

4. The evidence shows conclusively that prevailing wage rates in the plumbing and other construction industries are those established by the Missouri Industrial Commission under the express provisions of Section 190.210 V.A.M.S.; and the claim of defendant union, as stated on the picketing banners that defendant union has "established" wages and working conditions falsely assumes the right to do so and is directly in the teeth of the Missouri laws giving that right to the Industrial Commission of Missouri.

5. The recitals of the picketing banners, and the admissions against interest of defendant union's officers, expressly *disclaim* any desire to represent plaintiff's employees or to have plaintiff recognize defendant union as their bargaining agent. As stated by Walter Cross: "I think if you read that writing on the banner *we didn't have any intent* with respect to Henderson * * * As far as he is concerned, *we don't care what he does.*" (1st. Tr. 98, 99).

6. The failure of defendant's officers to take the stand and testify at the trial creates a *strong presumption*, having great evidentiary value, and amounting to clear proof, that their testimony, if produced, would have been adverse to their contention that their objective, in picketing, was only

to advertise their false claim that plaintiff was paying substandard wages. As this Court said, in *Spaeth* v. *Larking*, 325 S.W. 2d 767, 771: "We are considerably impressed by the fact that none of plaintiffs were offered as witnesses."

7. The evidence is uncontradicted that, while the phrases "Notice to the Public" and "Henderson Plumbing Company" appeared on the picketing banners in large red lettering, easily read from a distance, the remaining words on the banners were in small black type, which could *not* be read at a distance, thus creating the *false* impression in the minds of observers that plaintiff was carrying on a non-union operation. (1st Tr. 58).

8. There is no denial of the evidence which showed that plaintiff's business was being greatly damaged (the proof shows to the extent of more than $40,000), and that building contractors' in increasing numbers, found it impossible to contract with plaintiff for new plumbing work on their building contracts, because of the picketing. The Court, therefore, wholly failed to take into consideration the fact that the *real* motive for the picketing is shown by the results accomplished by that picketing.

9. It cannot be denied that the evidence shows conclusively that plaintiff was utterly powerless to meet the conditions which the defendants attempted to force upon him without directly violating the federal law, and, consequently, the subject matter of this suit cannot be said to involve a "labor dispute", because it was and is something that was and is wholly incapable of being resolved or adjusted by the parties.

None of this evidence is referred to or considered by the Court in its opinion. On the contrary, *without considering the evidence*, the Court has reached the conclusion

that the so-called "substandard picketing here involved" is an activity that "arguably" constitutes a labor dispute.

Had the Court considered this evidence, nearly all of which is undenied by the defendants, we are convinced that it would have reached the conclusion that no valid labor objective was involved, and that the conduct of defendants was wholly and only for the unlawful and malicious purpose of destroying plaintiff's business.

In any event, this Court has, by its opinion, rejected the principal contention of plaintiff that the facts of this case do not give rise to a "labor dispute" within the meaning of the federal act; and has rejected that contention without the slightest reference to the controlling facts in this record. Therein lies the necessity for granting a rehearing of this case, either in this Division or in the Court en banc. The issue is one of *fact* and *the facts should be considered* before a decision is attempted.

II.

**The opinion and decision of the Court, in holding that the facts of this case "arguably involve" a labor dispute, is in direct and irreconcilable conflict with the prior decisions of Division No. 2 of this Court in Adams Dairy Co. v. Burke, 293 S.W. 2d 281; and the two decisions of Division No. 2 in Adams Dairy Co. v. Dairy Employees Union, 250 S.W. 2d 481, and 339 S.W. 2d 811.**

In all three of these Adams Dairy Company cases, the jurisdiction of the state court was sustained because the *facts* before the court disclosed that the purpose of union activity complained of was not "reasonably related to, and not in furtherance of any legitimate labor objective" of the unions there involved. In reaching that conclusion in all three cases, the Court first gave careful consideration to, and analyzed in detail, the evidence upon which that conclusion was based.

As pointed out under Point I, supra, the Court in rendering its opinion in the case at bar made no attempt whatever *to analyze the evidence before it.* As the inevitable result of the Court failure to consider the evidence, the opinion is in direct and irreconcilable conflict with the decision of Division No. 2 of this Court in *Adams Dairy Co.* v. *Burke, et al.*, 293 S.W. 2d 281. In the Burke case, the Court did consider, at great detail, the evidence before it pointing out the falsity of testimony, and drawing from the whole record before it the inescapable conclusion that:

> "We conclude *from all of the evidence* and circumstances, and particularly from the admissions of the defendants, that the purpose of the concerted activity against plaintiff was not *reasonably* related to and not in furtherance of any *legitimate* objective of Local 603, but was imposed and carried out by the defendants as a means of inflicting, as its *primary objective*, damage to plaintiff's because plaintiff, *by requirement* of law, was conducting its business contrary to the wishes of the defendants. This constituted a malicious interference with the business of another." l.c. 290.

Again, at l.c. 292, of the report of the Burke opinion, Division No. 2 of this Court states:

> "In this case plaintiff did not allege 'unfair Labor practices' under the federal act, and we are of the opinion that the *facts* do not *reasonably* bring the controversy within the sections of the federal act prohibiting 'unfair labor practices' or within that conduct for which protection is afforded by that act."

Again, at l.c. 293:

> "Defendants also contend that the state courts do not have jurisdiction because *if the facts are as we have found them* their conduct is of the nature and type to constitute an unfair labor practice under 8(b)(4). *We do not agree.*"

Finally, at l.c. 289, the Court, in Burke, states:

> *"It is inconceivable that the public policy of this state should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the federal law requires him to do and forbids him to change if he is to remain in business."*

The Burke opinion recognizes the fact that: "The determination of the objectives of defendants *is a question of fact.*" (l.c. 289) Accordingly, it *analyzes the evidence* and makes findings of fact, reaching the conclusion that the facts, as so found, do not constitute a labor dispute. In the case at bar, this Court does *not* analyze the evidence, and does *not* make findings of fact in arriving at the conclusion that a labor dispute *is* involved. *Therein lies the conflict.*

When the evidence in this record is analyzed, it will be found that it is almost entirely identical with the evidence before the Court in the Burke case. If the present opinion is sound, the Burke opinion cannot stand. Therein lies the necessity, since the two opinions are from different divisions of the Court, that the case should be transferred to the Court en banc.

The Burke opinion involved the operations of the Adams Dairy Company of St. Louis. The other two Adams Dairy Company opinions, cited in the headnote, involve the operations of the Adams Dairy Company at Blue Springs, Missouri. The two operations are of two separate corporations, related in ownership.

The first Blue Springs opinion (250 S.W. 2d 481) deals with a situation which arose before the decision of the U. S. Supreme Court in *Garner* v. *Teamsters Union*, 36 U.S. 468; 74 S.Ct. 361; and involved the right of Adams Dairy to abandon its milk delivery operations, and adopt the plan

of selling its products only at its docks. The union, contending that, thereby, its members were being thrown out of work, threatened to strike, with consequent picketing. A temporary injunction prevented the strike and the picketing, which was made permanent after a hearing on the merits in the trial court, affirmed by this Court on appeal. Both the trial court, and this Court, after a review of the evidence, held that the decision of the Dairy Company to discontinue deliveries of its products, and sell them only at its docks, was a business decision, and not a labor decision; and that, therefore, the threatened strike was for no valid objective, and hence did not involve a labor dispute.

Some years later, after the Garner decision had been announced, defendants in the case arising in Blue Springs filed a motion in the lower court to dissolve the permanent injunction (which this Court had approved), on the ground that "the law has changed", that is, that the pre-emption doctrine, as decided in Garner, deprived the state court of jurisdiction to enjoin. When the lower court refused to act upon defendant's motion, the case reached this Court on appeal. Briefs were filed, in which it was pointed out that there was nothing in the record to show that the dairy was engaged in interstate commerce. Thereupon, the defendants, in open Court voluntarily dismissed their appeal. They then filed two affidavits in the lower court tending to show that, at the time the affidavits were prepared Adams was selling some milk in Kansas. Upon that showing the union re-filed its motion to dissolve the permanent injunction, and, unable to prevail in the lower court, again appealed to this court. It is that appeal which is referred to as the "second appeal" in the Adams Dairy case.

This court, in the preparation of its opinion in the case at bar, has inadvertently fallen into error in holding

that "the question of jurisdiction was raised but decided on the basis of lack of evidence of the interstate nature of Adams' business." (Op. p. 7). In that holding, the Court has, inadvertently, misconstrued the Adams opinion and entirely overlooked the fact that the holding there is on the ground, *both* that interstate commerce is not involved, and on the ground that *the matter does not involve a labor dispute*.

The brief of Respondent in that case, which is on file with the Clerk of this Court in case No. 47768, shows conclusively that the lower court's ruling was defended on the grounds:

A. That the motion to dissolve is barred by the rule of res adjudicata, because the points there presented could have been, but were not, presented on the first motion to dissolve or on the first hearing of the case on its merits (the first appeal).

B. Federal jurisdiction under the Taft Hartley Act is a special jurisdiction, limited to cases *"presenting a labor dispute* in a matter affecting interstate commerce", and the failure of defendants to establish facts upon which that jurisdiction could rest is fatal to their claim.

C. "If it be conceded, arguendo, that issue was joined and the record shows the interstate character of plaintiff's business, the non-existence of a labor dispute effectually and finally determined on the first appeal, *renders the pre-emption rule inapplicable to this case.*"

The opinion of Division No. 2, at the outset, shows that the Court, although commenting that the plea of res adjudicata "may just be good", did not determine that plea because "we prefer that our decision rest on the merits" (l.c. 815).

This Court, by its opinion in the case at bar, has erroneously construed the Adams opinion (second appeal) as resting *solely* on the issue of interstate commerce. Nothing could be further from the fact. The interstate commerce issue was a flimsy issue with no showing of any connection between it and a legitimate labor dispute and, although the court considered it, *the basic holding is put squarely on the fact that no labor dispute is involved.* At l.c. 816 of the Adams opinion, the Court states:

> "Even if it be assumed that there was evidence from which the interstate nature of plaintiff's business appeared, there is *another* reason why the trial court's jurisdiction was not pre-empted by the federal act, and that is because the subject matter of the action *did not involve a labor dispute* within the meaning of that act. On the original appeal the *non-existence of a labor dispute was determined.* In *that* situation, and on the authority of Adams Dairy Co. v. Burke, 293 S.W. 2d 281, *it must be held* that the Court's jurisdiction of the subject matter was not impeached."

Thus it clearly appears that the Court in writing the opinion in the case at bar has inadvertently fallen into error with respect to the basis for the decision of the Court on the second appeal of the Adams case from Blue Springs.

The Court, by its opinion (p. 7) has rejected its former holdings in the three Adams cases in reliance upon the language used by the U. S. Supreme Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, quoting, from that opinion, the statement that "when an activity is *arguably* subject to #7 or #8 of the N.L.R. Act, the states as well as the federal courts must defer", leaving the matter to the N.L.R.B. No attempt is made in the opinion in the case at bar to consider the *evidence* relating to the activity complained of, or to show that the activity is, *in fact,* "arguably" a labor dispute within the meaning of the federal act.

Reference is made in the opinion to the fact that the Burke case was decided before the decision in Garmon; but, again, no attempt whatever is made to show that Garmon, in any sense, has changed the law of pre-emption or has, in any way modified the prior decisions of the federal Supreme Court on the subject which *were* in existence, and considered in Burke, such as Weber v. Anheuser Busch, 348 U.S. 468, 75 S.Ct. 480.

Actually, both Weber and Garmon are cases where the existence of a labor dispute is either well established, as *a fact* by the evidence, or is admitted by all parties to the action. In Garmon, the Court, points to the fact that the picketing was to compel the employer to sign a union contract requiring it to employ union members, and limits the pre-emption doctrine to those cases where "it is *clear* or may *fairly* be assumed" that the activity complained of constitutes an "unfair labor practice" covered by the act. The opinion then states:

> "The case before us is such a case. The adjudication in California has throughout been based upon the assumption that the behaviour of the petitioning unions constitutes an unfair labor practice. This conclusion *was derived from the facts,* as well as from their view of the act."

In the light of that record, and in the light of the *facts* before it, the Court, in Garmon has declared that activities which are "arguably" subject to the act are not within the jurisdiction of the state courts. The Court, in the case at bar, apparently regards this language, in Garmon, as modifying or changing the pre-emption rule as laid down in previous cases. We do not so understand it. In our view, the holding is exactly the same as the holding in the Weber case, and other earlier cases dealing with the pre-emption doctrine.

For example, in the Weber case, the test for determining the question is stated as follows:

> "But where the moving party itself alleges unfair labor practices, where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act may be *reasonably* deemed to come within the protection afforded by that act, the state court must decline jurisdiction."

The only difference between the Court's language in Garmon and the language it uses in Weber is that, in Garmon, the word "arguably" is used, while, in Weber, the word "reasonably" is used. In both cases, *the actual fact was that a labor dispute was present*, and all parties, in both cases, admitted that fact.

The word "arguably" cannot be said to contemplate anything other than a "reasonable" argument. If it should be construed to mean a fallacious and patently groundless argument, then it would open the door to a defeat of state jurisdiction by advancing claims having no basis in fact whatsoever, by fallacious and unreasonable *contentions*, rather than by the presentation of facts from which it can "reasonably" (that is, arguably) be said that a labor dispute exists.

The dictionary definition of the word "argue" is:

> "To urge *reasons* to support or contest a measure or opinion; *reason*. * * * To *Argue* is to *show the reasons* for or against, so as to make a matter clear by *reasoning*. (Britannica World Language Dictionary, Vol. 1, p. 78).

The same authority (Vol. II, p. 1051) defines a "reasoner" as "one who reasons or *argues*"; and the word "reasoning" as "the act or process of the mind by which from propositions known or assumed new propositions are

reached; *argumentation*; also, the reasons, proofs or *arguments* employed in such process".

Under the heading of "synonyms" in the same dictionary, the words "*argument, argumentation,* debate" are given. It is then stated:

> "*Reasoning* may be either deductive or inductive. *Argument* or *argumentation* was formerly used of deductive reasoning only; but, while reasoning may be informal or even unconscious, *argument* and *argumentation* strictly imply logical form."

It is clear, therefore, that the Court, in using the word "arguably" in Garmon, did not modify, and did not intend to modify the language of Weber and other cases wherein the word "reasonably" was used. Indeed, when it is considered that, in Garmon, a labor dispute was admittedly present, any attempt to construe the word "arguably" to embrace facts where the existence of a labor dispute could only be "argued" from *non-existent* facts, would be entirely beyond the scope of the decision.

A "labor dispute" is something that is susceptible of being *capable of adjustment* by the parties. If a demand is made that cannot possibly be met without violating controlling law, it cannot be held to be a labor dispute within the meaning of the Federal act. Demands of that character are sometimes called "illegal" demands. In the Burke case (293 S.W. 2d 281, l.c. 288) a long line of decisions, both from Missouri, and from the federal and other state jurisdictions, is cited in support of the rule that "the objective of concerted labor activity must be a lawful one". The activity complained of in Burke was not a lawful activity, because the objective of the union was one that *was not capable of adjustment* by the parties. In Burke, the Dairy Company could not escape the condemnations of the handbill without violating its labor

contract with the labor union that was the bargaining agent for its drivers, and the Dairy Company was only doing "that which the federal law requires him to do and forbids him to change if he is to remain in business." (l.c.. 289).

Again, in *National Labor Relations Board* v. *Indiana Desk Co.*, 149 Fed. 2d, 987, the employer was engaged in the manufacture of equipment for the War Department, under federal contract. The federal law provided that "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the president under this act," and violators, upon conviction, were subject to both fine and imprisonment. Nevertheless, the employees demanded an increase in wages, and went on strike when they were told that the employer was powerless to give them a raise in salary. At l.c. 990 of the report, the Court states:

> "There is presented the interesting and perplexing question as to whether the striking employees quit work as the result of a 'labor dispute' within the meaning of the act. Ordinarily, of course, a controversy concerning wages would involve a labor dispute. Also, ordinarily, a dispute, labor or otherwise, is something *capable of adjustment* by the parties. In the instant situation, however, it *was not within the power* of the strikers and respondent to settle that which is claimed as a 'labor dispute'. In fact, by a positive provision of law, they were precluded from so doing. It hardly seems reasonable to think that a 'labor dispute' was intended to include a dispute, the settlement of which would have violated a statutory provision."

In the case at bar, plaintiff could not "establish wages and working conditions" in accordance with those established by defendant union for its members without violating the federal law which required him to conduct all

negotiations concerning wages and conditions of employment with the District 50 union, and subjected him to the penalties of the act if he should yield to the pressures put upon him by the defendant union. *That is exactly the situation as it existed in the Burke case;* and that constitutes another reason why the objectives of defendant union were not "reasonably related" to and not in furtherance of any labor dispute.

It is therefore, perfectly clear that, when Division 2 decided the Burke case upon its view that the facts before it "the concerted activity against plaintiff was not *reasonably related* to and not in furtherance of any legitimate objective" of the union, it did not depart, in the slightest degree from the test of its jurisdiction as laid down in Garmon.

It is also a reasonable assumption that, if this court, in the preparation of the present opinion in the case at bar, had analyzed the evidence on the *factual issue* of the non-existence of a labor dispute, it would have followed the three decisions in the Adams Dairy cases. It is the failure of the Court to consider the evidence, or to treat the issue as a factual issue, that has brought its opinion into direct and irreconcilable conflict with the three decisions of Division 2 in the Adams Dairy cases. Because of that failure, and because of that conflict, a re-hearing should be granted, either in this Division, or before the Court en banc on transfer.

III.

**The interstate commerce issue, to which the Court, by its opinion, has given undue prominence, is wholly immaterial to the decision; it being conclusively shown that the activities complained of do not constitute a labor dispute within the meaning of the federal act.**

On the issue of interstate commerce, the brief of the plaintiff (Respondent) opens with the following:

"The non-existence of a labor dispute in this case effectually eliminates the question of involvement in interstate commerce as an appellate issue." (Resp. Brf. 34).

Nevertheless the opinion of the Court explores that issue at depth, and with much detail; and its discussion constitutes the major portion of the opinion. Plaintiff, in the brief, did not, and does not now concede that the record before the Court shows that plaintiff's operations "have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" (Chief Justice Hughes, in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 310 U.S. 1, 57 S.Ct. 615). Actually, the record shows that, out of an annual gross volume of $250,000, something less than $5,000 was represented by work in Kansas; and that, while approximately half of that volume represented purchases of material, all of the material was purchased in the State of Missouri, and there is no evidence of the circumstances under which those who supply the materials to plaintiff have acquired them, even though it should be assumed that at least a part of them were originally manufactured outside the State.

Under these circumstances, the "close and substantial relationship of plaintiff's business to interstate commerce" is not shown. No matter where the materials *originated* the wages and working conditions of Henderson's men could not add or detract one penny from their cost, or reduce or increase the amount of such materials so used.

We do not, however, belabor the point. Since the law is well settled that, in order to deprive the state court of jurisdiction, it must be affirmatively shown that *not only* is there an involvement of interstate commerce, *but also* that there is a *legitimate labor dispute*, the interstate commerce issue is wholly immaterial to the decision, we do not further consider its coverage in the opinion.

IV.

**The opinion and decision of the Court, in holding that consideration should be given to the filing of a complaint before the NLRB in deciding whether or not either interstate commerce or a labor dispute is sufficiently shown to deprive the state court of jurisdiction, entirely overlooks and fails to consider or decide plaintiff's contention that jurisdiction cannot be conferred upon the NLRB by consent (Point II Resp. Brf. 39); and the holding that such consideration should be given, has brought its opinion and decision into direct and irreconcilable conflict with the former and controlling opinions of this Court, Gibson v. Vaughn, 61 Mo. 418; Johnson v. Duessing, 332 S.W. 2d 950; United Cemeteries Co. v. Strother, 119 S.W. 2d 762; Simmons v. Friday, 224 S.W. 2d 90; Sisk v. Molinaro, 376 S.W. 2d 175; and with numerous other decisions both Federal and state.**

It is quite obvious that the Court was considerably influenced by the fact that, before this suit was filed, attempts had been made to get the National Labor Relations Board to intervene on Plaintiff's behalf. That is shown by the statement, on page 5 of the opinion that "Also *to be considered* was the Board's acceptance of the complaint involving the picketing here in question. The Board *made no express finding* on the jurisdictional issue." It also would seem obvious that the Court, in writing the opinion, has inadvertently overlooked, in its entirety, the argument of plaintiff on that point, as set forth in Respondent's brief under Point II, pages 39 to 43.

The Court correctly states that the NLRB made "no express finding" on the jurisdictional issue. That being true, the existence of its jurisdiction cannot be *presumed*, because the law is well settled that, as to tribunals of limited jurisdiction, the record must show, affirmatively, the *facts* upon which that jurisdiction rests. It is true that, as to courts of *general* jurisdiction, its jurisdiction

will be presumed in the absence of a contrary showing in the record but:

> "* * * this presumption does not prevail in respect to those whose jurisdiction is special and limited. In the latter class of cases the failure of some portion of the record or proceedings to show jurisdiction is necessarily fatal." (*Gibson* v. *Vaughn*, 61 Mo. 418, 420).

There is no such showing in this record. The showing is that a "charge" was filed before the Board, but that the Board after an *ex parte* investigation, declined to issue a complaint. No formal evidence was offered. No witnesses were produced or subjected to cross examination. Counsel were given no opportunity to develop the facts upon which jurisdiction, if it existed, must rest. All there is in this record is that because the Board stated that it had "investigated" the charge, it may be thereby assumed that the Board found, as a fact, that it had jurisdiction over it. All that this evidence amounts to is the *assumption*, without any evidence to support it, that the Board determined that it did have jurisdiction; and that the *plaintiff*, in filing the charge, in some way "conferred" jurisdiction on the Board.

Judge Tipton, speaking for Division No. 2 of this Court in United Cemeteries Company v. Strother, 119 S.W. 2d 762, 765, puts it this way:

> "A court takes jurisdiction of the subject matter by operation of the law, and cannot acquire it by appearance, *answer, contesting the proceedings, consent, waiver*, or by the doctrine of *equitable estoppel*. It is the uniform rule of this State that jurisdiction as to the subject matter of any suit cannot be waived in any manner, and a judgment in such cases is absolutely null and void."

The Court in "considering" the action of the Board, and in treating it as establishing the Board's jurisdiction in spite of the fact that there is no affirmative showing of the essential fact upon which that jurisdiction, if it exists must rest, has brought its opinion into direct and irreconcilable conflict with the opinion of Division 2 in the Strother case, just cited, and with all of the other opinions of the Court in the other cases cited in the headnote. In addition, it has inadvertently overlooked and failed to consider either the argument or the authorities on this important point in this case. Only by re-hearing, or by transfer to the Court en banc, can the error into which the Court has fallen be corrected.

V.

**Upon the whole record, the decree of injunction and the judgment for damages rendered by the court below should have been affirmed by this Court on appeal; and a reversal of that decree and judgment constitutes a plain miscarriage of justice.**

The defendants in this case have never offered any defense to the merits of the suit. They admit that their actions have seriously damaged the plaintiff, and, at least impliedly, admit that, if they had not been enjoined from so doing, they would have continued their unlawful conduct until they had effectively and completely destroyed plaintiff's business. He cannot get relief from the NLRB. (His misguided application before that tribunal was brushed aside without the issuance of any complaint, and without giving him an opportunity to present any evidence in support of his charges). He comes to the state court for relief, and is granted relief by the lower court; but this court, by opinion has left him in no man's land. This Court holds that the state court has no jurisdiction. The N.L.R.B. "investigated" the charge, and refused to issue a

complaint or to give him a hearing on it. "He hath no place to lay his head."

What did he do that was wrong? Could he change the provisions of his labor contract with District 50? Could he "adopt" the "Wages and working conditions" which the defendant union had "established". He was, and is, forbidden by law from doing any of those things. This decision has left him powerless to protect himself, in any manner.

We can do no more than quote, as we have quoted it many times in this hearing, the language of Burke:

> "It is inconceivable that the public policy of this state should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the federal law requires him to do and forbids him to change if he is to remain in business." It is, indeed, inconceivable.

WHEREFORE, Respondent moves the Court to set aside its opinion and judgment in this case, and to grant a rehearing of this cause, or, in the alternative, to transfer the cause to the Court en banc for final decision.

Respectfully submitted,

/s/ John B. Ewing, Jr.
John B. Ewing, Jr.
/s/ Richard A. Erickson
Richard A. Erickson
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/s/ Charles V. Garnett
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Attorneys for Respondent

## THE JUDGMENT OF THE COURT BELOW

Concurrently with the filing of its opinion, Division No. 1 of the Supreme Court of Missouri, on May 10, 1971, entered its Judgment, which, upon the overruling of Petitioner's motion for rehearing or in the alternative to transfer the cause to the Court en banc, entered on June 18, 1971, became, on said last named date, under the laws and practice of the Supreme Court of Missouri, the final judgment of that Court. Said judgment is as follows:

**No. 55,543**

Circuit Court No. 660894

IN THE SUPREME COURT OF MISSOURI

March Session, 1971

Gene Henderson, doing business as Henderson Plumbing and Heating Company,
Respondent,

vs.

Plumbers Local No. 8, of the American Federation of Labor, et al.,
Appellants.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment; and that the said appellants recover against the

said respondent costs and charges herein expended, and have execution therefor. (Opinion filed.)

| | |
|---|---|
| Transcript | $77.25 |
| Docket Fee | 10.00 |
| Total | $87.25 |

STATE OF MISSOURI—Sct.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the March Session thereof, 1971, and on the 10th day of May 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 16th day of July 1971.

/s/ Marion Spicer Clerk.

..... D. C.

(Seal)

**ORDER OVERRULING MOTION FOR HEARING OR TO TRANSFER**

The order of Division No. 1 of the said Supreme Court of Missouri overruling said motion, was entered on June 14, 1971, and is as follows:

**No. 55,543**

Circuit Court No. 660894

IN THE SUPREME COURT OF MISSOURI

May Session, 1971

Gene Henderson, doing business as Henderson Plumbing and Heating Company,
Respondent,

**vs.**

Plumbers Local No. 8, of the American Federation of Labor, et al.,
Appellants.

Now at this day the Court having seen and fully considered the motion of the respondent for a rehearing or in the alternative to transfer the above-entitled cause to the Court en Banc, doth order that said motion be and the same is hereby overruled.

STATE OF MISSOURI—Sct.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1971, and on the 14th day of June 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 16th day of July 1971.

/s/ Marion Spicer, Clerk.

..... D. C.

(Seal)

## THE PETITION FOR DAMAGES AND FOR AN INJUNCTION

Said petition was filed in the Circuit Court of Jackson County, Missouri (the trial court) on June 4, 1964, and is as follows:

**No. 55,543**

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

GENE HENDERSON, doing business as HENDERSON PLUMBING & HEATING COMPANY, 8111 Raytown Road, Raytown, Missouri,
Plaintiff,

vs.

PLUMBERS LOCAL NO. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, 101 East Armour, Kansas City, Missouri,

and

WALTER CROSS, 5940 East 136th Street, Kansas City, Mo.,

JACK MAINEY, JR., 10500 East 79th Terrace, Raytown, Mo.,

LOUIS STINE, 3600 East 48th Street North, Kansas City, Mo.,

SETH SLOCUM, 701 East 36th Street, Kansas City, Mo.,

JOHN LIND, 101 East Armour, Kansas City, Mo.,

FRANK W. FISHER, 7721 Wallace, Kansas City, Mo.,

WILLIAM AKIN, 836 West 39th Street, Kansas City, Mo.,

R. P. FLAIGLE, 7224 Bales, Kansas City, Mo.,

JOHN GRINDINER, 108 West 99th Street,
Kansas City, Mo.,
R. J. ERISMAN, 8101 Raytown Road,
Raytown, Missouri,
ARNOLD VAN TRUMP, 8511 East 47th Terrace,
Kansas City, Mo.,
BERNARD T. HENEHAN, 7327 Walnut,
Kansas City, Mo., and
EVERETT WILLIAMS, 7717 East 83th Street,
Kansas City, Mo.,
Defendants.

**Count One**

For his first cause of action, and petition for damages, plaintiff states:

1. Plaintiff is now, and was at all times herein mentioned, a citizen and resident of Jackson County, Missouri, doing business under the name and style "Henderson Plumbing & Heating Company".

2. The defendant Plumbers Local No. 8 of the American Federation of Labor (sometimes hereinafter referred to as "Union" or as "Local No. 8") is an unincorporated, voluntary labor organization, with offices located at 101 East Armour Boulevard, in Kansas City, Missouri, the membership of which is so large that it is impracticable to name all of its members as defendants herein, and the character of the rights sought to be enforced by plaintiff in this action is such that there are common questions of law or fact affecting the several rights, and common relief is sought against all of said members; and, because it is impracticable to bring them all before the Court herein, within the meaning of Section 507.070 Missouri Statutes, Annotated, and Rule 52.08 of the Rules of Civil Procedure promulgated by the Supreme Court of Missouri, this suit is brought by plaintiff as a class action; and the defendants

named herein are sufficient to secure adequate representation of all members of the class, in this, to-wit: The defendant Walter Cross is the business manager, the defendants Jack Mainey, Jr., and Louis Stine are business representatives, the defendant Seth Slocum is the President, the defendant John Lind is the Vice-President, the defendant Frank W. Fisher is the Secretary-Treasurer, the defendants William Akin, R. P. Flaigle, John Grindinger and R. J. Erisman are members of the Executive Board, the defendant Arnold Van Trump is a member of the Examining Board, the defendant Bernard Henehan is a member of the Finance Board, and the defendant Everett Williams is the Recording Secretary of, and all of said named defendants are members of, said Local No. 8, and, as such officers and members the said named defendants are actively in charge of the business and affairs of, and fairly insure adequate representation of all of the members of said Local No. 8.

3. Plaintiff is now, and was at all times herein mentioned, the owner and operator of the business known as the Henderson Plumbing & Heating Company, doing a large volume of business as a plumbing contractor engaged in plumbing construction in new residence properties in residential subdivisions and development projects in Jackson County, Missouri; and, until the unlawful acts of defendants herein complained of, was doing a profitable business as such plumbing contractor.

4. At some time prior to the 22nd day of October, 1963, the exact date unknown to plaintiff, the defendants, for no lawful purpose, and intending to harass, annoy, injure, destroy, and otherwise unlawfully interfere with the due prosecution of plaintiff's business, entered into a plan, conspiracy, confederation and concerted action among themselves, and others to plaintiff unknown, designed and

intended to injure, destroy and otherwise interfere with plaintiff's business.

5. On or about said 22nd day of October, 1963, in furtherance of their said unlawful purpose, design and intention to interfere with and destroy plaintiff's business, the defendants, by means of banners, posters, signs and displays, and by means of pickets parading in the immediate vicinity of plumbing contracting work being performed by plaintiff, prepared, published and displayed notices, reading substantially as follows:

"NOTICE TO THE PUBLIC

This notice is addressed only to the general public and not to any employee or employer. The employees of

HENDERSON PLUMBING COMPANY

who are performing plumbing work on this job do not receive all of the benefits, such as pensions, health and welfare plans, and other advantages which have been established in this area by Plumbers Local No. 8, A.F.L.-C.I.O. We are not asking for recognition, nor do we desire to represent *their employees*, and we have no dispute with any other *employer*."

6. Plaintiff states that said so-called Notice to the Public has been repeatedly and continuously displayed by defendants by means of pickets at places where plaintiff was engaged in the performance of its contracts for the installation of plumbing in residences being constructed; that the purpose of defendants in displaying such notices by means of such pickets was and is malicious and unlawful and not in furtherance of any legitimate objective of said Local No. 8, but was carried out by defendants for the wrongful and malicious purpose of causing damage to plaintiff's said business, and was and is a malicious and unlawful interference with the business of plaintiff.

7. At the time of the filing of this suit defendants are continuing the course of conduct described in paragraphs 5 and 6 of this petition, and are picketing and displaying said notice at 8704 Crescent Avenue, in Raytown, Missouri, where plaintiff is now engaged in the performance of a contract for the installation of the plumbing in a residential property under course of construction; that said notice is periodically displayed by defendants at each location where plaintiff is, or is about to be, engaged in the performance of a contract for the installation of plumbing; and that defendants, unless restrained and enjoined by the Court from so doing, will continue, by means of pickets and otherwise, to display such notices wherever plaintiff is engaged in the performance of such contracts.

8. As a direct result of the aforesaid wrongful acts of defendants, plaintiff's reputation as a plumbing contractor has been damaged and injured; plaintiff has lost the opportunity to obtain contracts for the installation of plumbing; has had the performance of such contracts delayed, and the cost and expense thereof greatly increased, and has suffered, by reason thereof, actual damages in the total amount of Fifty Thousand ($50,000.00) Dollars.

9. Plaintiff states that the acts of defendants herein complained of are and were wrongful, intentional, wanton and malicious, and, by reason thereof, plaintiff is entitled, in addition to his actual damages as aforesaid, to punitive damages in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars.

WHEREFORE, on this, the first count of his petition, plaintiff prays judgment against the defendants in the sum of Fifty Thousand ($50,000.00) Dollars actual damages and One Hundred Fifty Thousand ($150,000.00) Dollars punitive damages, and for his costs.

**Count Two**

For his second cause of action, and petition for an injunction, plaintiff adopts each and every of the allegations of paragraphs 1 to 9 both inclusive of Count One of this petition in this Count Two thereof, and further states:

10. Defendants have threatened to, and will continue their unlawful conduct as hereinbefore set forth, and will continue to picket plaintiff's contract work, not only at 8704 Crescent Avenue in Raytown, Missouri, but also at each and every other location where plaintiff now has or may hereafter obtain, contracts for the installation of plumbing, unless immediately enjoined and restrained from so doing; that plaintiff has no plain, adequate and complete remedy at law in the premises, and is entitled to the injunctive process of the Court herein in order to prevent great and irreparable loss, harm and damage to plaintiff in his business as aforesaid.

WHEREFORE, on this, the second count of his petition, plaintiff prays that, upon the filing of this petition, the Court shall issue its temporary restraining order enjoining and restraining the said defendants and each and every of their officers, agents, servants, and employees, and each and every member of said Local No. 8 from forming or maintaining any picket line or from picketing at or near any place where defendant is, or is about to be, engaged in the performance of any plumbing contract, or from publishing, circulating, or displaying, by means of pickets or otherwise, any notice or display in form or in substance as described in paragraph 5 of this petition, and from publishing, circulating, or displaying, by means of pickets or otherwise, any other or similar notice, or display designed or intended to injure plaintiff in his said business, or designed or intended to carry out their said unlawful plan, conspiracy or confederation against the plaintiff; that a hearing be had herein and, upon such hear-

ing, that defendants be perpetually enjoined from doing or performing said acts; that the Court make and enter such other and further orders, judgments and decrees in the premises as may be just and proper; and that plaintiff have and recover of and from the defendants his costs and charges in this behalf expended, and that he have therefor execution.

Richard A. Erickson
Charles V. Garnett
1000 Temple Building
Kansas City, Missouri 64106
Attorneys for Plaintiff

**MOTION TO DISMISS AND DISSOLVE TEMPORARY RESTRAINING ORDER**

On the filing of said petition for damages and for an injunction, Division No. 7 of the Circuit Court of Jackson County, Missouri, the judge thereof sitting as assignment judge, issued a temporary restraining order enjoining and restraining defendants from continuing the acts complained of pending a hearing, to which defendants, on June 16, 1964, filed their Motion to Dismiss and to Dissolve Temporary Restraining Order, which said motion, as set forth in the transcript of said proceedings at pages 9 to 11 of the original record, 2nd transcript (which said transcript does not set out the caption of said motion), is as follows:

Come now defendants and for their motion to dismiss and dissolve the temporary restraining order issued herein on June 4, 1964, state:

1. That the conduct alleged in the plaintiff's petition, if true, constitutes either unfair labor practices prohibited by Section 8 (b) of the National Labor Relations Act as Amended, or protected concerted activity under Section 7 of said Act, and therefore any exercise of jurisdiction by this Court would constitute a violation of Article I Section

8 and Article VI of the Constitution of the United States for the reasons that

(a) The subject matter of this complaint has been pre-empted by the Federal Congress by the enactment of the aforesaid Act, and

(b) Any injunction would be in conflict with and in derogation of the rights and privileges thereunder, and

(c) The assumption of jurisdiction by this Court is contrary to the exclusive jurisdiction vested by said Act in The National Labor Relations Board, and further, that the alleged conduct on behalf of the defendants herein is an exercise of rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. Further, the picketing complained of has been brought to the attention of the National Labor Relations Board, which agency has exclusive jurisdiction over said picketing, and the National Labor Relations Board is presently conducting an investigation over said picketing.

3. Under the decisions of the United States Supreme Court, the state court has no jurisdiction to award damages since the sole remedies for said picketing are provided in the National Labor Relations Act through the exercise of exclusive jurisdiction by the National Labor Relations Board.

WHEREFORE, Defendants move that the court dismiss plaintiff's petition and dissolve the temporary restraining order heretofore issued herein and that defendants for their costs be awarded judgment.

(FILED June 16, 1964,

**FINDINGS AND ORDER OF TEMPORARY INJUNCTION**

After hearing the evidence adduced by the parties on said motion to dismiss and dissolve said temporary injunction, the said Circuit Court of Jackson County, Missouri, Division No. 7 thereof, entered its findings and decree of temporary injunction, the same having been entered on August 17, 1964, and is, as set forth at pages 11 to 13 of the original record, 2nd transcript, which omits caption, as follows:

This cause having come on for hearing before the Court on plaintiff's application for a temporary injunction herein in accordance with the prayer of Count Two of his petition, and the parties having appeared and presented in open Court their evidence on the issues tendered by said application for injunction, and having presented to the Court their briefs and the arguments of their counsel, and the Court having heard and considered the same, and being how fully advised, finds the issues herein on said application for a temporary injunction in favor of the plaintiff and against the defendants.

The Court further finds that plaintiff is not engaged in interstate commerce within the meaning of the Federal Labor Management Relations Act, and amendments thereto, Title 29, Section 141 et. seq. U. S. C. A.; and the Court further finds that the acts of defendants complained of in plaintiff's petition do not constitute or give rise to a labor dispute within the meaning of said act; and by reason thereof this Court has jurisdiction to hear and determine this cause and to grant all appropriate relief herein and is not barred by said act from exercising jurisdiction over the subject matter of this suit.

The Court further finds that the acts of defendants in picketing work being performed by plaintiff and of displaying signs or notices at or near places where plaintiff

is, or is about to be, engaged in the performance of plumbing contracts, and of publishing, circulating or displaying, by means of pickets or otherwise, notices or displays in form or substance as described in paragraph 5 of plaintiff's petition, were and are unlawful and in violation of the rights of plaintiff and inflict upon plaintiff substantial and continuous damage, and that all such acts and conduct of defendants should be enjoined and restrained until such time as this cause can be heard and determined on its merits, or until the further order of the Court herein.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED by the Court that the said defendants, and each of them, their agents, servants and employees, and each and every member of said Local No. 8 of the American Federation of Labor, be and they are hereby enjoined and restrained from forming or maintaining any picket line or from picketing at or near any place where plaintiff is, or is about to be, engaged in the performance of any plumbing contract, or from publishing, circulating or displaying, by means of pickets or otherwise, any notice or display in form or in substance as described in paragraph 5 of plaintiff's petition herein, and from publishing, circulating or displaying, by means of pickets or otherwise, any other or similar notice or display designed or intended to interfere with plaintiff in the performance of any such plumbing contract, or designed or intended to inflict injury or damage upon plaintiff.

IT IS FURTHER ORDERED by the Court that this order and injunction against the defendants shall be and remain in full force and effect until final hearing and determination of this suit, or until the further order of the Court herein.

Done in open Court this 17th day of August, 1964.

## DEFENDANT'S ANSWER

Thereafter, and within the time granted by the court, and by leave of court, the defendants, on January 6th, 1965, filed their answer to plaintiff's petition (including in said answer, a renewal of their motion to dismiss) which said answer, as set forth in the transcript of said proceedings at pages 20 and 20, original record, 2nd transcript (which said transcript does not set out the caption of said answer), is as follows:

Come now the defendants and for their answer to plaintiff's petition state the following:

1. Defendants admit paragraphs 1, 2 and 3 of Count One, except that they state that in addition thereto the acts of the defendants were not unlawful and that the plaintiff was engaged in business in Kansas.

2. Defendants deny paragraph 4 of Count One of plaintiff's petition.

3. Defendants admit that they did picket as alleged in paragraph 5 of Count One.

4. Defendants deny the allegations in paragraph 6, Count One of the petition, that the actions were malicious and unlawful.

5. Defendants admit as alleged in paragraph 7 that the defendants engaged in picketing, but deny that said picketing was malicious or unlawful.

6. Defendants deny paragraphs 8 and 9 of Count One of plaintiff's petition.

7. For their further answer to Count Two of plaintiff's petition, defendants incorporate their answers herein with reference to the allegations contained in paragraphs 1 to 9 of Count One of the petition.

8. Defendants deny paragraph 10 of plaintiff's petition.

9. Defendants herein renew their motion to dismiss, hereinbefore filed, for the reason that the plaintiff is engaged in an industry affecting interstate commerce within the meaning of §2 (6) and (7) of the National Labor Relations Act as Amended; that the National Labor Relations Act grants exclusive jurisdiction to the National Labor Relations Board to regulate the picketing complained of in the aforesaid petition; that the subject matter of the dispute has been presented to the National Labor Relations Board and that agency has issued a decision upholding the picketing as an exercise of rights guaranteed under §7 of the National Labor Relations Act; and for the further reason that the picketing complained of is an exercise of freedom of speech guaranteed by the Constitution of the United States and the Constitution of Missouri.

WHEREFORE, having fully answered, defendants pray that the petition be dismissed and the defendants go hence with their costs, and for such other further relief as the court may deem necessary.

* * *

**JUDGMENT FOR DAMAGES AND PERMANENT INJUNCTION**

Thereafter, and after final hearing conducted by Division No. 10 of said Circuit Court of Jackson County, Missouri, (to which division said cause had been duly assigned), the said Circuit Court, on the 10th day of February, 1970, entered its findings, judgment and decree, which said findings, judgment and decree, as set forth in the original record of said proceedings at pages 87 to 92, second transcript (which said transcript does not set out a caption) is as follows:

**Findings and Decree**

This cause having come on for hearing before the Court for final hearing on the pleadings and the evidence, and the parties having appeared in open Court and presented their evidence on the issues tendered by the pleadings herein, and, upon the conclusion of the evidence, having presented to the Court their briefs and arguments upon the issues herein, and the Court having heard and considered the same, and being now fully advised,

FINDS the issues herein, generally, in favor of the plaintiff and against the defendants, both upon Count One and upon Count Two of plaintiff's petition, and that plaintiff is entitled to damages in accordance with the prayer of Count One of his said petition, and to a permanent injunction in accordance with the prayer of Count Two of his said petition.

The Court further finds that the business of plaintiff is intra-state, and not inter-state, in character, and does not have such a close and substantial relationship to interstate commerce that the control thereof is essential or appropriate to protect that commerce from burdens or obstructions within the meaning, intent and purpose of the Federal Labor Management Relations Act, and amendments thereto, Title 29, Section 141, et. seq. U.S.C.A. and the Court further finds that the acts of defendant complained of in plaintiff's petition do not constitute or give rise to a labor dispute within the meaning of said Federal Act; and by reason thereof this Court has jurisdiction to hear and determine this cause, and to grant all appropriate relief herein, and is not barred by said Federal Act from exercising jurisdiction over the subject matter of this suit.

The Court further finds that, at some time prior to the 22nd day of October, 1963, the defendants, for no lawful

purpose, and intending to harass, annoy, injure, destroy, and otherwise unlawfully interfere with the due prosecution of plaintiff's business as a plumbing contractor, entered into a plan, conspiracy, confederation and concerted action among themselves and others, designed and intended to injure, destroy and otherwise interfere with plaintiff's business; and that, on or about the 22nd day of October, 1963, in furtherance of their said unlawful purpose, by means of banners, posters, signs and displays, and by means of pickets parading in the immediate vicinity of plumbing contract work being done by plaintiff, prepared, published and displayed notices reading substantially as set forth in paragraph 5 of plaintiff's petition; and that said defendants continued said course of conduct from said last named date until the filing of this suit and thereafter until restrained by the temporary restraining order heretofore issued herein by this Court, and that, unless so restrained and permanently enjoined, have threatened to continue, and will continue said unlawful conduct to the damage and injury of the plaintiff.

The Court further finds that the acts of defendants in picketing work being performed by plaintiff, and of displaying signs or notices at or near places where plaintiff was engaged in the performance of plumbing contracts, and of publishing, circulating or displaying, by means of pickets or otherwise, notices or displays in form or substance as described in paragraph five of plaintiff's petition, were and are unlawful and in violation of the rights of plaintiff, and, during all of the times said notices or displays were so circulated, distributed or displayed, inflicted upon plaintiff substantial damage, as hereinafter more particularly set forth, and that all of such acts of defendant constitute a malicious interference with plaintiff's business; and that the temporary restraining order heretofore issued herein should be made permanent.

The Court further finds, from the uncontradicted evidence in this case, that the aforesaid unlawful acts of defendants, have resulted in damage to plaintiff in each of the following particulars: (a) that the amount of time of plaintiff's employees lost as the direct result of such unlawful acts, averaged thirty man hours per job on 113 jobs or contracts being performed by plaintiff, resulting in damage to plaintiff in the sum of $21,221.00; (b) that the amount of time of plaintiff himself lost as the direct result of such unlawful acts, averaged five hours per job on 113 jobs or contracts being performed by plaintiff, resulting in damage to plaintiff in the sum of $5,650.00; (c) that, by reason of said unlawful acts, plaintiff lost a plumbing contract with one Lawrence Mock for the plumbing in a thirty-unit apartment building then in course of erection in the City of Raytown, Missouri, resulting in damage and loss of profit to plaintiff in the sum of $2,400.00; (d) that during the period of eight months from the time such wrongful acts began, and until enjoined by the temporary restraining order heretofore issued herein, plaintiff, as the direct result of such unlawful acts, sustained loss of profits by reason of the diminution of his business amounting to a loss of $6,400.00; (e) that plaintiff, in order to protect his work from the damages resulting from said unlawful acts, was compelled to employ, and did employ counsel to bring and maintain this suit, and by reason thereof has incurred liability for the fees of counsel, which the Court finds to be of the reasonable value of $7,500.00; and that, by reason of said unlawful acts, plaintiff's reputation as a plumbing contractor has been damaged and injured and for which he is entitled to recover of and from the defendants in the amount of $1.00; and the Court further finds that all of plaintiff's actual damages, in all of the particulars heretofore set forth, and for which plaintiff is entitled to recover of and

from the defendants, amount, in the aggregate, to $43,172.00.

The Court further finds that the acts of defendants complained of constitute a willful and malicious interference with plaintiff's business, and, by reason thereof, plaintiff is entitled to recover not only his actual damages, but also punitive damages in the sum of $500.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that, upon the issues joined on Count One of plaintiff's petition, the plaintiff have and recover of and from the defendants the sum of $43,172.00 actual damages, and the further sum of $500.00 punitive damages, in all, the sum of $43,672.00 as actual and punitive damages, together with his costs and charges in this behalf expended, and that he have therefor execution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that, upon the issues joined on Count Two of plaintiff's petition that the prayer of said Count Two of said petition be, and the same is hereby granted; that the temporary restraining order heretofore issued herein be, and the same is hereby made permanent; that the defendants Plumbers Local No. 8 of the American Federation of Labor, an unincorporated labor organization, and the defendants, Walter Cross, Jack Mainey, Jr., Louis Stine, Seth Sloeum, John Lind, Frank W. Fisher, William Akin, R. P. Flaigle, John Grindiner, R. J. Erisman, Arnold Van Trump, Bernard T. Henehan, and Walter Williams, managing officers of said Union, and their successors, and each of said defendants, be, and they are hereby permanently enjoined and restrained from forming or maintaining any picket line or from picketing at or near any place where plaintiff is, or is about to be, engaged in the performance of any plumbing contract, or from publishing, circulating or displaying, by means of pickets, ban-

ners, or otherwise, any notice or display in form or substance as described in paragraph 5 of plaintiff's petition herein, and from publishing, circulating or displaying, by means of pickets or otherwise, any other or similar notice or display designed or intended to interfere with plaintiff in the performance of any such plumbing contract, or designed or intended to inflict injury or damage upon plaintiff; and that all costs herein be and the same are hereby taxed against the said defendants, and that plaintiff have, for his costs herein, execution.

Dated this 10th day of February, 1970.

**PRESERVATION OF PLAINTIFF'S BASIC OBJECTION TO CONSIDERATION OF PROCEEDINGS BEFORE NATIONAL LABOR RELATIONS BOARD**

At the first opportunity afforded to plaintiff, namely, at the hearing before Division No. 7 of said Circuit Court on defendants' motion to dismiss and dissolve the temporary injunction, the original record shows the following:

> "Mr. Fousek: In the depositions taken there was introduced, for example, a charge filed by Mr. Henderson on October 25, 1963, which referred to this particular picketing that is being complained of here. That charge was investigated by the National Labor Relations Board, and on October 31, 1963, after having assumed jurisdiction and investigated the case, the National Labor Relations Board determined that the picketing was not a violation of Section 7 of the National Labor Relations Act, as it was charged there.
>
> Mr. Erickson: I would like to make an objection. We object to this argument because the exhibits referred to are not in evidence.
>
> Mr. Fousek: Well, I would like to offer in evidence the exhibits which are contained in the deposition
>
> * * *

Mr. Erickson: We objected to them then and we object to them now on the ground that they are immaterial to any issue in this case." (Orig. Rec. 1st Tr. 2, 3).

* * *

"The Court: It is a dispute between two unions?

Mr. Fousek: Well, it is a dispute between the union and an employer, but it is also affecting another union.

The Court: Is it a case of one union feeling that their men should be on the job?

Mr. Fousek: No. The dispute is this: That defendants in this case believe that the employer is not paying wages nor maintaining the working conditions and paying the same benefits which it has established in the area for other employers.

The Court: Is it a matter of contract?

Mr. Fousek: No. They are not asking to enter into a contract. All they are asking—

The Court: It had a contract with this petitioner, did it?

Mr. Fousek: No, they do not have a contract.

The Court: The point I am trying to get at is, is there a labor dispute?

Mr. Erickson: The picketing union is not the union that has the employees of the Henderson Plumbing Company. The Henderson Plumbing Company employs District 50 of the United Mine Workers, which is an entirely separate union. I understand, first of all, that they have to recognize that union. This is another union, the A. F. of L.-C.I.O. Plumbers Union No. 8, which has come in and formed this picket line, when there is no labor dispute. That is the point in this case. They have no legitimate conceivable labor dispute.

* * *

The Court: If I understand what you are saying, the United Mine Workers has a contract with the petitioner or the plaintiff here?

Mr. Fousek: That's right.

The Court: And that contract provides for lower wages than the defendant's contract?

Mr. Fousek: In the operation of—

The Court: Than the defendant says his employees should have on like work. They want the plaintiff here to pay higher wages to employees that they don't represent?

Mr. Fousek: Higher wages and better benefits.

The Court: And better benefits?

Mr. Fousek: That's right.

The Court: To employees that they don't even represent?

Mr. Fousek: That is right.

The Court: All right, sir. Go ahead." (Orig. Rec. 1st (Tr. 5-7).

Q. (By Mr. Fousek, cross-examining witness) And you are aware that the National Labor Relations Board has taken jurisdiction and issued an order directing the union to cease such picketing, are you not?

Mr. Garnett: Just a minute. I want to object to that question on this ground: The question of jurisdiction of subject matter is never and cannot be made a matter of consent. Neither can the determination of a jurisdictional question, which depends upon facts, by the Labor Board, in any wise interfere with Your Honor's jurisdiction, if the facts support Your Honor's jurisdiction. Therefore, any jurisdiction the Labor Board may or may not have taken in this matter is entirely immaterial to this hearing.

The Court: I am rather of that opinion, gentlemen I am going to sustain the objection to the question." (Orig. Rec. 1st Tr. 24).

* * *

"Mr. Garnett: Your Honor, while he is looking for those exhibits, may we have the understanding in the record that while I don't want to object to each one of these documents, my basic objection is still before Your Honor with respect to the—

The Court: You mean the order of the Labor Board?

Mr. Garnett: That's right.

The Court: In connection with any complaints that may have been filed in connection with the picketing of this plaintiff or one of the members of the Council?

Mr. Garnett: That's right.

The Court: Do you want to so stipulate, Mr. Manning?

* * *

Mr. Manning: He wants a continuing long line of objections?

The Court: Yes.

Mr. Manning: Yes. I don't object to that.

The Court. May it be so understood?

Mr. Manning: Very well." (Orig. Rec. 1st Tr. 28, 29).

## THE FEDERAL STATUTE WHICH THE CASE INVOLVES

The questions here presented relate to provisions of the Labor Management Relations Act, 1947, as amended, Tit. 29, U.S.C. 141, et seq.: the pertinent parts of which are as follows:

Section 1. Short title: Congressional declaration of purpose and policy.

* * *

(b) * * * It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, * * * and to

protect the rights of the public in connection with labor disputes affecting commerce.

* * *

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. * * * It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

* * *

§ 152. Definitions

When used in this subchapter—

* * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining

contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * *

§ 160. Prevention of unfair labor practices—Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

——— o ———

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-299

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
*Petitioner,*

vs.

PLUMBER'S LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, and WALTER CROSS, JACK MEANY, JR., LOUIS STINE, SETH SLOCUM, JOHN LIND, FRANK W. FISHER, WILLIAM AKIN, R. P. FLAIGLE, JOHN GRINDINER, R. J. ERISMAN, ARNOLD VAN TRUMP, BERNARD T. HENEMAN, and EVERETT WILLIAMS,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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## TABLE OF CONTENTS


The Opinion Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

The Federal Statutes Involved ..... 4

Statement of Facts ..... 5

Reasons for Granting the Writ—

I. The Decision Below Is in Direct Conflict with the Principles Announced by This Court in the Garmon, Weber and Other Decisions, All of Which Require a Showing of Facts Reasonably Within the Applicable Sections of the Federal Act in Order to Deprive State Courts of Their Common Law Jurisdiction Over the Acts of Labor Unions Committed Without the Existence of a Legitimate Labor Objective to Justify Them 9

II. The Opinion Below, in Giving Evidentiary Value to the Refusal of the Regional Director to Issue a Complaint, Notwithstanding the Non-Existence of a Legitimate Labor Objective and the Admitted Fact That the National Labor Relations Board Made No Finding of Facts to Support Its Jurisdiction, Is in Direct Conflict with the Fundamental Principle Fully Recognized by Numerous Decisions of This Court, That Jurisdiction of the Subject Matter Must Be Affirmatively Shown, and Cannot Be Waived, or Conferred by Prior Action, Consent or Estoppel .... 16


## Table of Authorities

CASES


*Adams Dairy Company* v. *Burke*, (Mo.) 293 S.W.2d 281 ..... 10, 11, 12, 13, 14

*Adams Dairy Co.* v. *Burke*, 352 U.S. 969 ..... 13
*American Fire Ins. Co.* v. *Finn*, 341 U.S. 6 ..... 19
*McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 ..... 17, 18
*McNutt* v. *McHenry Chevrolet Co.*, 298 U.S. 190 ..... 17
*NLRB* v. *Indiana Desk Co.*, (7th Cir.) 149 F.2d 987 .... 14
*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 ..... 9, 11, 12, 13
*U. S.* v. *Corrick*, 298 U.S. 435 ..... 18
*U. S.* v. *Griffin*, 303 U.S. 226 ..... 18
*Weber* v. *Anheuser Busch*, 348 U.S. 468 ..... 9, 11, 12, 13

STATUTES

National Labor Relations Act of 1947, as amended (29 U.S.C. Sections 141, et seq.)—

Section 141(b) ..... 4
Section 151 ..... 4
Section 152-(9) ..... 4
Section 158(a)(1)(2)(5) ..... 4
Section 159(a) ..... 4
Section 160(a) ..... 4

OTHER AUTHORITY

Britannica World Dictionary, Vol. I, pp. 284, 369 ..... 13

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
*Petitioner,*

vs.

PLUMBER'S LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, and WALTER CROSS, JACK MEANY, JR., LOUIS STINE, SETH SLOCUM, JOHN LIND, FRANK W. FISHER, WILLIAM AKIN, R. P. FLAIGLE, JOHN GRINDINER, R. J. ERISMAN, ARNOLD VAN TRUMP, BERNARD T. HENEMAN, and EVERETT WILLIAMS,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner, Gene Henderson, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Missouri, rendered in these proceedings on May 10, 1971.

## THE OPINION BELOW

The opinion of Division No. 1 of the Supreme Court of the State of Missouri, as yet unreported, appears in the Appendix, filed separately herewith, at pp. 2-9.[1] Petitioner's timely motion for a rehearing, or in the alternative, to transfer the cause to the Court of Missouri (A. 9-28) was duly filed on the 22nd day of May, 1971, and was, by said Division No. 1 of said Supreme Court overruled by order entered on the 14th day of June, 1971, without opinion (A. 31).

## JURISDICTION

The opinion and judgment of Division No. 1 of said Supreme Court of Missouri was entered on May 10, 1971 (A. 1); and, upon the entry of the order overruling petitioner's motion to transfer the cause to the Court en banc, on the 14th day of June, 1971 (A. 3) became the final judgment of the Supreme Court of the State of Missouri on that day; and this petition for certiorari was filed less than ninety days from the date last aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), and Rule 19(a) of the Rules of this Court as adopted June 15, 1970, effective July 1, 1970.

## QUESTIONS PRESENTED

The questions arising, and upon which the final decision of this Court should be made, are:

---

1. Page references to the Appendix, filed separately will be indicated as follows: (A. ). Page references to the original record in the court of first instance (which may be filed herein if the writ is granted) will be indicated as follows: (Orig. Rec. 1st Tr. p. ) to indicate matters appearing in the record of the preliminary hearing before the court of first instance; and (Orig. Rec. 2nd Tr. p. ) to indicate matters appearing in the record of the final hearing before the court of first instance.

1. Where an employer is under a binding labor contract with one union[2] does another union have the right to picket under the claim that such employer provides substandard wages and other benefits for his employees, even though such employer, under his union contract, is powerless to deal with the picketing union?

2. Where the employer presented a charge to the Regional Director of the National Labor Relations Board in an effort to avoid the unlawful picketing, and, after investigation, the Regional Director refused to issue a complaint thereon, and there is no showing that the Regional Director conducted any hearing or had any proof of the existence of a labor dispute adversely affecting interstate commerce, and there was no hearing either before the Regional Director or before the National Labor Relations Board, and no findings were made establishing the existence of a labor dispute, did the filing of that charge, and the refusal of the Regional Director to issue a complaint thereon constitute an assumption of jurisdiction by the National Labor Relations Board over the subject matter of a later cause of action filed by the employer in the State court for damages for conspiracy and for an injunction to prohibit the unlawful picketing, and operate to defeat the jurisdiction of the State court over that cause?

3. In the absence of an express finding by the National Labor Relations Board on such jurisdictional issue, can it be said (as the court below, in its opinion, said)

---

2. In the case at bar, the petitioner, Henderson, is under a binding contract with Local Union No. 14436, District 50, United Mine Workers of America, an entirely separate and distinct labor organization, constituting that union as the sole and exclusive bargaining agent for Henderson's employees, which contract fully provides for the wages and working conditions of said employees—a labor union duly certified as the exclusive bargaining agent for petitioner's employees.

that the Board's "acceptance"[3] of the "complaint" involving the picketing is of evidentiary value in determining whether or not a labor dispute is involved in the jurisdictional sense?

(No issue is tendered by this petition for writ of certiorari as to interstate commerce, because, as is pointed out in petitioner's motion for rehearing in the Court below—A. 23, 24, in the absence of a labor dispute within the meaning of the Federal Act, the alleged interstate character of the matters before the Court would not be sufficient to confer jurisdiction upon the National Labor Relations Board, nor to deny jurisdiction in the State courts.)

## THE FEDERAL STATUTES INVOLVED

The following sections and sub-sections of the National Labor Relations Act of 1947, and amendments thereto (29 U.S.C. Sections 141, et seq.), the pertinent parts of which are set forth in the Appendix, at the pages indicated below:

Section 141(b) (A. 51)
Section 151 (A. 52)
Section 152-(9) (A. 52)
Section 158(a)(1)(2)(5) (A. 53)
Section 159(a) (A. 53)
Section 160(a) (A. 54)

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3. The language of the opinion of the Court below is: "Also to be considered was the Board's acceptance of the complaint involving the picketing here in question." (A. 6). The fact is that no complaint was ever issued. A charge was filed with the Regional Director, who, after an ex parte investigation and without the hearing of testimony of witnesses subject to cross-examination, determined that there was insufficient evidence upon which to issue a complaint, and none was issued. Consequently, the National Labor Relations Board never received or heard any complaint, took no evidence, and made no finding of facts nor determination of whether or not a labor dispute was involved.

## STATEMENT OF FACTS

The facts relevant to the questions presented by this petition for certiorari are, in the main, uncontroverted, and therefore may be presented to the Court in summary fashion.

The petitioner, Gene Henderson, is a plumbing contractor, engaged in installing plumbing in new house construction in the area of Raytown, a suburb of Kansas City, Misouri. He is under a binding labor contract with Local Union No. 14436, District 50, United Mine Workers of America (not to be confused with the defendant Local No. 8, American Federation of Labor). For some years before, and during, the activities of Plumber's Local No. 8 and its agents which form the subject matter of this suit, the District 50 union was, and still is, the duly recognized and certified bargaining agent of all of Henderson's employees; and the defendant Local No. 8 did not represent his employees and had no legal right to speak for them in any way.

Nevertheless, on or about October 22, 1963, and continuing until enjoined by the court of first instance in the instant suit, the representatives of Local No. 8 began the picketing of job sites where Henderson was engaged in installing plumbing, carrying banners which charged that Henderson's employees "do not receive all of the benefits, such as pensions, health and welfare plans and other advantages which have been established in this area by Plumbers Local No. 8, AFL-CIO. We are not asking for recognition nor do we desire to represent their (Henderson's) employees and we have no dispute with any other employer" (A. 3).

Other crafts engaged in other types of work on the houses where Henderson was installing plumbing refused

to cross that picket line, and, as a result, Henderson's men were forced to leave each job site and remain away so long as the pickets were there. The time lost thereby averaged 30 hours per job, additional time. 113 jobs were thus picketed, to the total damage of Henderson, as found by the trial court on undisputed and uncontradicted evidence, in the total amount of $43,672.00 (A. 47).

Although the banners did not use the word "wages", the testimony of defendant union's principal officers was to the effect that they were charging that Henderson pays substandard "wages". Actually, the wages paid by Henderson were and are substantially *higher* than those paid by other contractors working under labor contracts with defendant Local No. 8, the fact being that Henderson's contract with District 50 called for higher take home pay rather than additional fringe benefits.

The banners themselves were deceptive in that the words "Notice to the Public" and "Henderson Plumbing Company" appeared thereon in large red type, which could be read from a distance, while the remainder of the banner was in small black type which could *not* be read from a distance, and the undisputed testimony is that the impression was thereby created, in the minds of the public, that Henderson was "non-union".

After the picketing had continued from October 22, 1963 until June 4th, 1964, Henderson, in order to prevent the complete destruction of his business, instituted this suit, a common law action for damages inflicted upon him in the course of an unlawful conspiracy designed and intended to destroy his business (A. 32), and for an injunction to prevent continuance of the unlawful acts.

The federal questions sought to be reviewed were first raised in the court of first instance, the Circuit Court of Jackson County, Missouri.

Upon the filing of the petition, that court issued a temporary restraining order, restraining the unlawful conduct of the defendants until a hearing could be had on the merits. The first pleading of defendants was a motion to dissolve the temporary restraining order on the stated ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the suit, and that the National Labor Relations Board is "presently conducting an investigation of said picketing" (A. 38).

Evidence was taken by the trial court on the motion to dissolve, covering the circumstances of the picketing and the damages resulting therefrom. The evidence offered by defendants consisted of a copy of the charge filed by Henderson on October 25, 1963 before the Regional Director of the National Labor Relations Board and the letter of the Regional Director dated October 31, 1963 declining to issue a complaint upon the charge upon the ground of insufficient evidence. Similar charges, filed in 1960, were offered by the defendants and rejected by the court as being too remote in point of time to have probative value.

At the first appearance of these documents in evidence, plaintiff's counsel interposed, and thereafter kept alive (A. 48-51) the basic objection that jurisdiction of the subject matter of an action can never be conferred by consent, waiver, or estoppel, and that, since the National Labor Relations Board is a tribunal of special or limited jurisdiction, the facts establishing its jurisdiction must be affirmatively shown before the jurisdiction of a court of general jurisdiction over the same subject matter may be denied under the doctrine of pre-emption or otherwise.

The answer, filed after the temporary injunction had been issued, again pleaded lack of jurisdiction in the State court and the claim of exclusive jurisdiction in the National Labor Relations Board (A. 42, 43).

No evidence was offered in the trial court, either at the time of the hearing on the motion to dissolve, nor at the final hearing on the merits, to establish the existence of a labor dispute within the meaning of the Federal Act, or to establish facts which would affirmatively show a labor dispute and consequent jurisdiction in the National Labor Relations Board. The only evidence on that issue offered by defendants, consisted of the charge filed before the Regional Director, and his refusal to issue a complaint thereon after an ex parte investigation at which no witnesses were produced for testimony and cross-examination. There was no evidence whatever of any affirmative finding by the National Labor Relations Board that a labor dispute exists or that interstate commerce is adversely affected thereby.

At the conclusion of all of the evidence, the trial court made specific findings, including the finding of the nonexistence of a labor dispute (A. 44), that the court has jurisdiction to grant relief and is not barred by the Federal Act from exercising that jurisdiction; that the plaintiff is entitled to recover damages in the amount specifically found by the court; and that the acts complained of constitute a willful and malicious interference with plaintiff's business, for which he is entitled to both actual and punitive damages (A. 47).

The Supreme Court of Missouri, on appeal, has reversed the decree and judgment of the court below on the stated ground that exclusive jurisdiction of the matters at issue rests in the National Labor Relations Board, and that defendant's motion to dismiss for lack of jurisdiction should have been sustained (A. 9).

The Appendix, page 48 and following, contains such necessary pertinent quotations from the record, or summary thereof, as will show that the federal questions here involved were timely and properly raised.

## REASONS FOR GRANTING THE WRIT

### I.

**The Decision Below Is in Direct Conflict with the Principles Announced by This Court in the Garmon, Weber[4] and Other Decisions, All of Which Require a Showing of Facts Reasonably Within the Applicable Sections of the Federal Act in Order to Deprive State Courts of Their Common Law Jurisdiction Over the Acts of Labor Unions Committed Without the Existence of a Legitimate Labor Objective to Justify Them.**

The decision below, if permitted to stand, will greatly enlarge, and extend far beyond the Congressional intent, and far beyond the applicable holdings of this Court, the jurisdiction of the National Labor Relations Board and consequent denial of the common law jurisdiction of the State courts thereby imposing added burdens upon the already over-burdened federal judiciary. No longer will it be necessary to show a legitimate labor objective in order to deprive the state courts of their common law jurisdiction to deal with the wrongful conduct of labor unions committed outside the area of labor controversy. It will be enough to assert, even on palpably false claims, that their acts are committed in the name of labor.

In the case at bar, the *real purpose* of the offending picketing—the real objective of defendants—was to destroy plaintiff's business. Defendant union had no interest in plaintiff's employees—no legal right to represent them. Indeed, the banners themselves expressly negated even the desire on the part of defendant union to represent them. The *stated* purpose of the banners was to "inform the public" that Henderson's men do not receive certain benefits which the defendant union claims that it has "established"

4. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Weber* v. *Anheuser Busch*, 348 U.S. 468.

in the area, thus ignoring the right of the union that *does* represent plaintiff's employees to contract for them the benefits which *that* union has "established". The defendant's principal officers, under oath, made the false claim that Henderson pays substandard "wages", but were hard put to define any legitimate objective for the picketing; and the fact is that the wages Henderson pays are higher than those received by the workers under Local No. 8 contracts.

The important fact, however, is that the wages and working conditions of Henderson's employees were negotiated by the union of their own choosing, the duly certified bargaining agent for them, and Henderson was bound by his contract to deal exclusively with that union, and not with defendant. Hc could not deal with defendant union without violating his contract, and without violating the law.

The case at bar is almost an exact parallel with the case of *Adams Dairy Company* v. *Burke*, 293 S.W.2d 281, decided by Division No. 2 of the Supreme Court of Missouri. In that case, also, the defendant union was not the certified bargaining agent for plaintiff's employees, who were represented by another union. Notwithstanding that lack of representation, the defendant union in the Adams case attacked the plaintiff by handbills—a secondary boycott—and plaintiff brought a common law action for conspiracy, and for an injunction. Division No. 2 of the Supreme Court of Missouri, in sustaining the jurisdiction of the state court to enjoin as against the contention that the exclusive jurisdiction was in the National Labor Relations Board, after full consideration of the evidence, correctly ruled that the facts before the court did not present a "labor dispute" within the meaning of the Federal Act, and that the State court, rather than the National Labor Re-

lations Board, had jurisdiction over the suit to enjoin, and for damages for the acts committed in the course of carrying out the conspiracy described in the petition.

The court below, in the instant case, refused to follow Burke on the stated ground that it was decided prior to Garmon and was in violation of the principles laid down by this Court in Garmon (A. 7), quoting the language of Garmon that:

"(W)hen an activity is *arguably* subject to #7 or #8 of the (N.L.R.) Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."

The court below, by its opinion, has thus construed this Court's opinion in Garmon as *changing the law* over the law as declared by this Court in prior decisions, and, by the use of the word "arguably", departing from the principle, as announced in prior decisions, that the doctrine of pre-emption applies where the facts "reasonably" bring the controversy within the protection afforded by the federal act.

It is, however, perfectly clear from a reading both of Garmon and of Weber (*Weber* v. *Anheuser Busch*, 348 U.S. 468) that the Court, by the use of the word "arguably" in Garmon, did not seek to broaden the test, as laid down in Weber, namely, that the test is that of "reasonableness". Indeed, as was pointed out in petitioner's motion for rehearing filed in the court below (A. 20, 21), there is no difference, in principle, between Garmon and Weber, the word "arguably" being synonymous with, and conveying exactly the same meaning as the word "reasonably".

The facts before the Court, both in Garmon and in Weber, disclosed the existence of a labor dispute within the meaning of the federal act. In Garmon, the State court

had expressly found, and this Court accepted as a fact, that "the behavior of the petitioning unions constitutes an unfair labor practice". In Garmon, the purpose of the picketing was to compel the employer to sign a union contract requiring it to employ union members. These were the facts before the Court which were characterized as "arguably" bringing the case within the federal act.

In Weber, also, a labor dispute was involved. The Court, in applying the doctrine of pre-emption, uses the following language:

> "(Where the) moving party itself alleges unfair labor practices (under the federal law), where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction".

Division No. 2 of the Missouri Supreme Court, in the Burke case, which Division No. 1 of that Court, in the opinion sought to be reviewed, refused to follow, fully recognizes the doctrine of pre-emption, and correctly holds that its application covers only those cases where the facts *reasonably* bring the controversy within the sections of the federal act prohibiting unfair labor practices. Concerning Weber, the court in Burke, after quoting the foregoing language from Weber, correctly states:

> "It is clear from this statement that if these enumerated conditions are *not* present, state courts are not prohibited by reason of the federal act from exercising jurisdiction. In this case plaintiff did not allege 'unfair labor practices' under the federal act, and we are of the opinion that the facts do not *reasonably* bring the controversy within the sections of the federal act prohibiting 'unfair labor practices' or within that conduct for which protection is afforded by that act."

Thus Burke rationally harmonizes its decision with Weber; and, since there is no difference in meaning between the word "arguably" and the word "reasonably", Burke is also in full harmony with Garmon. Any different view would broaden Garmon far beyond the meaning, the intention, and the language, of the opinion of the Court in the use of the word "arguably" rather than the word "reasonably".

It will be noted that this Court declined certiorari to review Burke. (*Adams Dairy Co.* v. *Burke*, 352 U.S. 969). We are not unmindful of the rule that such action does not amount to approval of the opinion of the court below, the review of which by certiorari is thus denied; but it is equally true that, by denial of certiorari, this Court did not *disapprove* that decision.

The question thus presented is one of great public interest. The court below, by its opinion, seeks to construe Garmon as a decision modifying Weber (and thus broadening the jurisdiction of the National Labor Relations Board) and the pre-emptive doctrine, to include those cases where the facts do not present a case involving a labor dispute. Such was never the intention of the Congress. Such was not the intention of this Court in Garmon.

In another respect, the opinion below broadens, and extends far beyond the Congressional intent, the meaning of the word "dispute" as used in the federal act, and in all of the decisions, both federal and state, dealing with it. The word "dispute" as thus used, means a controversy *that is capable of adjustment*. To "dispute" is to argue about, to discuss, to controvert. (Brittanica World Dictionary, Vol. I, p. 369). A "controversy" is a "debate or disputation" (Ibid, p. 284). Ordinarily, any dispute as to wages or working conditions is susceptible of being resolved by the agreement of the parties involved in the dis-

pute. But, where resolution of the dispute is impossible to attain, then that element of the word "dispute" which contemplates the ability to resolve that dispute, ceases to exist.

We find no decision of this Court dealing with that precise principle, but it is well illustrated by the decision of the U. S. Court of Appeals, 7th Circuit, in *NLRB* v. *Indiana Desk Co.*, 149 F.2d 987, where that Court ruled that no labor dispute was involved, within the meaning of the federal act where the employer could not legally accede to the demand of his employees for a wage increase because, by federal law and Presidental proclamation, it was made a crime to grant a wage increase to employees engaged in the performance of war contracts without the consent of the War Labor Board. The court there held that a labor dispute, within the meaning of the federal act, is something that is capable of adjustment by the parties,[5] and where it was not within their power to settle or adjust that which was claimed to be a labor dispute, the National Labor Relations Board was without jurisdiction of the subject matter of the action.

The Missouri court, in Burke, held:

> "It is inconceivable that the public policy of this State should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the Federal Law requires him to do and forbids him to change if he is to continue in business."

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5. In the Indiana Desk case (l.c. 990), the Court states: "Ordinarily, of course, a controversy concerning wages would involve a labor dispute. Also, ordinarily, a dispute, labor or otherwise, is something capable of adjustment by the parties. In the instant situation, however, it was not within the power of the strikers and respondent to settle or adjust that which is claimed to be a 'labor dispute'. In fact, by a positive provision of law they were precluded from so doing. It hardly seems reasonable to think that a 'labor dispute' was intended to include a dispute the settlement of which would have violated a statutory provision."

The opinion of the court below does violence to that rule, and seeks to broaden the Federal Act, and the doctrine of pre-emption, to include even those matters where the parties are powerless, under positive provisions of the law, to accede to the demands of labor which are entirely outside the scope of legitimate labor controversy. Here, also, the public interest is great, and the need for authoritative declaration of the applicable law by this Court is evident.

If the opinion of the court below is permitted to stand, the right and power of state courts to exercise their common law jurisdiction over labor organizations in matters where their acts are not committed in furtherance of any legitimate labor objective will be foreclosed, and members of the public injured by such acts will be left entirely without a remedy. The result reached by the court below in the case at bar is one that shocks the conscience and destroys the faith of the public in the administration of justice. The Regional Director of the Labor Board declined to issue any complaint, and refused to hear petitioner. That avenue of escape from the damaging effects of the unlawful acts of the defendant union was closed against him. The court below, by its opinion, has now closed off the only other avenue of escape, and has left him in a position where he has no lawful recourse to protect himself against conduct characterized by the trial court's findings, and abundantly shown by the evidence (none of which evidence is referred to in the opinion below) as being "unlawful and in violation of the rights of plaintiff * * * and (that) all of such acts of defendants constitute a malicious interference with plaintiff's business." (A. 45). By that same finding and decree, plaintiff was awarded punitive damages (in addition to actual damages) because "the acts of defendants complained of constitute

a willful and malicious interference with plaintiff's business." (A. 47).

The right of labor to strike and to picket, and to seek, by all lawful means, the accomplishment of its legitimate labor objectives, has been widely acclaimed, and is universally recognized; but it is a matter of great public interest that such rights be not extended to include the conduct of labor which has no legitimate labor objective.

It is, therefore, respectfully submitted that this Court should grant certiorari in this case and authoritatively and effectively limit the conduct of labor to its legitimate labor objectives. The public is greatly concerned that the common law jurisdiction of the state courts must be preserved to deal with those cases (such as the case at bar) where no legitimate labor objective is involved. It is of great public importance that the common law jurisdiction of the State courts in matters where no labor dispute is involved should never be curtailed by judicial interpretation, and additional burdens thus shifted to the federal judiciary.

II.

**The Opinion Below, in Giving Evidentiary Value to the Refusal of the Regional Director to Issue a Complaint, Notwithstanding the Non-existence of a Legitimate Labor Objective and the Admitted Fact That the National Labor Relations Board Made No Finding of Facts to Support Its Jurisdiction, Is in Direct Conflict with the Fundamental Principle, Fully Recognized by Numerous Decisions of This Court, That Jurisdiction of the Subject Matter Must Be Affirmatively Shown, and Cannot Be Waived, or Conferred by Prior Action, Consent or Estoppel.**

It is obvious that the thinking of the court below, in the preparation of its opinion, was greatly influenced by the fact that, before the present suit was instituted, the petitioner had sought relief from the National Labor Re-

lations Board. As pointed out in the brief filed in, but overlooked in the Court below, and in the motion for rehearing, however (A. 25, 27), that Board is a tribunal of special, limited jurisdiction, and unless the facts upon which its jurisdiction rests actually exist, and findings thereof disclose their existence, no action on the part of the petitioner, or even on the part of the Board itself, could confer jurisdiction where none existed. Consequently, unless there be an affirmative finding of facts sufficient to disclose jurisdiction, any action taken by the Board, or by the parties cannot confer that jurisdiction.

In the case at bar, there is no proof of any kind that the Board ever made any finding of any fact in support of its jurisdiction,[6] or even that any such facts ever existed. There is, however, abundant proof in the record made in the *State* Court that the jurisdictional facts do *not* exist, because it is well established that the jurisdiction of the Board depends not only upon the involvement of interstate commerce, but also upon the existence of a legitimate labor dispute. There is also abundant proof of the facts, supporting the finding of the trial court, that no labor dispute *is* involved, and that the state court *does* have jurisdiction.

This Court has many times spoken upon the subject. In *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, and the companion case of *McNutt* v. *McHenry Chevrolet Co.*, 298 U.S. 190, the court dismissed suits to

6. The Board never had the opportunity to inquire into the facts which would be necessary to support its jurisdiction. The Regional Director investigated the charge for the purpose of determining probable cause, that is, violation of the Federal Act by the picketing union, and came to the conclusion that the acts complained of were not "proscribed" by the federal act; hence no complaint was issued, no formal hearing was had, no evidence, with right of cross-examination, was adduced, either on the issue of commission of acts proscribed by the federal act, or on the jurisdictional issue.

restrain the enforcement of statutes regulating retail business because there was no evidence and no finding, showing that the matter in controversy exceeded the jurisdictional amount of the federal District Court. Mr. Chief Justice Hughes, in the *General Motors* case, said:

> "They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations, he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. * * * If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case dismissed. * * * Here, the allegation of the bill of complaint as to the jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District court had jurisdiction and the bill should have been dismissed upon that ground."

In *U. S.* v. *Griffin*, 303 U.S. 226, 229, Mr. Justice Brandeis said:

> "Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed."

In *U. S.* v. *Corrick*, 298 U.S. 435, 440, Mr. Justice Roberts said:

> "The appellants did not raise the question of jurisdiction at the hearing below. But lack of jurisdiction of a

federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause."

In *American Fire Ins. Co.* v. *Finn*, 341 U.S. 6, 17, Mr. Justice Reed said:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action, or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."

In the case at bar, it matters not whether plaintiff, in filing the charge with the Regional Director, did so under the mistaken notion, either of the law or of the fact, that the Board had jurisdiction of his charge; or did so with the deliberate intention of *conferring* jurisdiction on that Board. In neither view would his act confer jurisdiction where none, in fact, existed. Were it otherwise, it would be entirely within the control of the parties to "work a wrongful extension" of the Board's jurisdiction and give it power "the Congress has denied."

The opinion of the court below does just that. Without any finding of facts by the Board, without any reference in its opinion to the controlling facts, the court below has worked a "wrongful extension" of the jurisdiction of the Board, giving to it "power the Congress has denied."

In this, also, the public interest is great. The jurisdiction of the National Labor Relations Board should at all times be kept within Congressional limits. Those limits require the existence of a bona fide labor objective in a

matter affecting interstate commerce, and, in the absence of supporting facts, and of a finding of such facts, the common law jurisdiction of the state courts to deal with the conduct of labor where no legitimate labor objective is involved should be preserved.

It is respectfully submitted that the petition for certiorari should be granted.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

**No. 71-299**

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
*Petitioner,*

vs.

PLUMBERS' LOCAL NO. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, and WALTER CROSS, JACK MEANY, JR., LOUIS STINE, SETH SLOCUM, JOHN LIND, FRANK W. FISHER, WILLIAM AKIN, R. P. FLAIGLE, JOHN GRINDINER, R. J. ERISMAN, ARNOLD VAN TRUMP, BERNARD T. HENEMAN and EVERETT WILLIAMS,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## INDEX


Table of Cases ..... I
Table of Statutes ..... I
Opinion Below ..... 1
Jurisdiction ..... 2
Question Presented ..... 2
Federal Statute Involved ..... 2
Statement of the Case ..... 2
Argument ..... 5
Conclusion ..... 7


### Table of Cases


*Construction and General Laborers Union* v. *Curry*, 371 U.S. 542 ..... 5
*Garner* v. *Teamsters Union*, 346 U.S. 485 ..... 5
*IBEW Local 1264* v. *Broadcast Service of Mobile*, 379 U.S. 812 ..... 5
*ILA* v. *Ariadne Shipping Co.*, 397 U.S. 195 ..... 5, 6
*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 ..... 5
*Weber* v. *Anheuser Busch*, 348 U.S. 468 ..... 5, 6


### Table of Statutes


29 U.S.C. Sections 141 et seq., which are fully set forth in Petitioner's Appendix pp. 52-53 ..... 2
29 U.S.C. Sec. 160 a ..... 4
29 U.S.C. Sec. 152(9) ..... 6

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### OPINION BELOW

The Opinion of the Missouri Supreme Court, as yet unreported, appears in Petitioner's Appendix at pp. 2-9. No question is raised as to the finality of that Decision.

## JURISDICTION

Jurisdiction of this court is invoked under 28 USC Sec. 1257 (3) and Rule 19 (a) of this Court.

## QUESTION PRESENTED

Although presented somewhat obtusely in the Petition in three different forms, the simple question is whether a state court is without jurisdiction to award damages because of peaceful picketing or to grant an injunction prohibiting peaceful picketing of an employer engaged in interstate commerce who maintains substandard working conditions which picketing truthfully discloses the substandard working conditions complained of where such employer has filed charges against the labor organization with the National Labor Relations Board under the Labor-Management Relations Act, and said Board accepted said charges, investigated them, and then dismissed them for lack of merit.

## FEDERAL STATUTE INVOLVED

The determination of the question involves the interpretation and application of the Labor Management Relations Act of 1947, 29 USC Section 141 et seq., the pertinent portions of which are set forth in the Appendix to Petitioner's Brief at pages 51-54.

## STATEMENT OF THE CASE

Respondent Plumbers Local 8 of the American Federation of Labor is a labor organization engaged in repsenting craft employees engaged in the plumbing industry

in the Greater Kansas City Area. Petitioner is an employer doing business in Kansas and Missouri employing plumbers. He is a member of a multi-employer association which has a contract with District 50 of the United Mine Workers[1]. Respondents notified Petitioner by Registered Mail that they were informed that Petitioner did not provide his employees with all of the benefits which the union had established in the area. Petitioner did not respond. Respondents then placed a picket banner on Petitioner's projects complaining of the substandard conditions. The banner stated that employees of Petitioner "do not receive all of the benefits such as pensions, health and welfare plans, and other advantages which have been established in this area by Plumbers Local No. 8 AFL-CIO. We are not asking for recognition nor do we desire to represent their employees and we have no dispute with any other employer." See Petitioner's Appendix p. 3.

Employees of the Petitioner at the time of the picketing testified against Petitioner in the State Court, and stated that the facts asserted on the banner were truthful. They testified they received no pensions, that no health and welfare programs were maintained, that they did not receive overtime for work in excess of 40 hours per week, and that they did not receive show-up time, travel time, premium time, or holiday pay. Except for dis-

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1. This contract is unusual for although it sets forth certain wage rates it contains a provision in Article V Section 3 that if a "wage increase and/or a fringe benefit is granted or given to the *organized* workers in the Greater Kansas City Area engaged in the crafts trades or classifications listed in Appendix A of this Agreement, then such wages and/or fringe benefits shall be given by the employer to the employees covered under this agreement * * *." In a real sense, Respondent, in bargaining with other employers establishes the rates of pay and fringe benefits of employees of the Petitioner. This provision is contained in Article V Section 3 of Petitioner's Exhibit 1.

puting his employees' testimony concerning his failure to pay overtime to his employees, Petitioner did not deny the existence of the other substandard conditions and that he did not meet the working conditions established by Respondent in these respects. Although Petitioner repeatedly asserts in his brief that his employees received greater take home pay he ignores entirely the contrary evidence by his employees.

A number of charges were filed with the National Labor Relations Board including one filed by the Petitioner in which he alleged that the picketing was unlawful, being an unfair labor practice affecting commerce within the meaning of Sections 8(b) 7(A) and (C) of the Labor Management Relations Act. The Regional Director accepted the charges, investigated them and then refused on October 31, 1963, to issue a complaint for the reason that "there is insufficient evidence that the charged Party's picketing is for an object proscribed by Section 8(b) (7) of the Act." Petitioner did not appeal this finding.

After failing to secure the relief he desired from the National Labor Relations Board, Petitioner then filed a suit for damages and for an injunction in the state court based upon the same facts contained in the charge filed before the National Labor Relations Board. The lower court granted the injunctive relief and awarded damages in the amount of $43,672.00. On appeal, the Supreme Court of Missouri unanimously reversed, holding that substandard picketing is an activity arguably subject either to Section 7 or 8 of the National Labor Relations Act and that, therefore, the subject matter had been pre-empted by Section 160(a) of the National Labor Relations Act and that the state court was without jurisdiction to grant the injunction or award damages.

## ARGUMENT

**The Supreme Court Should Deny the Writ for the Reason That the Decision of the Supreme Court Is Completely in Harmony with the Decisions of the United States Supreme Court and Therefore Petitioner's Writ Does Not Meet the Standard Set Forth under 28 USC Sec. 1257(3) and Rule 19a of the Rules of the Supreme Court.**

The Supreme Court of Missouri in its opinion carefully considered the decision of the United States Supreme Court, quoting from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245; *ILA-Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 90 S. Ct. 872; and *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542.

In addition, Respondent cited to the Missouri Supreme Court the following cases, all of which support the ultimate decision of that court:

*Garner* v. *Teamsters Union*, 346 U.S. 485;
*Weber* v. *Anheuser Busch*, 348 U.S. 468;
*IBEW Local 1264* v. *Broadcast Service of Mobile*, 379 U.S. 812.

In his brief before the state court and in his brief before this court Petitioner does not cite a single case of this court which is inconsistent with the holding of the Supreme Court of Missouri which is presently subject to this Petition. The only decisions of this court which are cited by petitioner and which relate directly to the doctrine of federal pre-emption hold that Congress in enacting the National Labor Relations Act granted exclusive authority over disputes of this character to the National

Labor Relations Board and by virtue of that delegation the states were ousted of jurisdiction over the subject matter. This is precisely what the Missouri Supreme Court held. These holdings are in complete harmony with the Decision of the Missouri Supreme Court in this matter and hence no Writ of Certiorari should issue.

Petitioner appears to rely almost exclusively on the argument that this case is not subject to the doctrine of federal pre-emption because Respondent was not the recognized bargaining representative of his employees and that, therefore, there was no labor dispute. His argument overlooks the case of *ILA* v. *Ariadne Shipping Co.*, supra, in which this court reversed a Florida Court's holding that substandard picketing did not involve a "labor dispute" and found the doctrine of federal pre-emption does apply to such conduct. It similarly overlooks the decision of this court in *Weber* v. *Anheuser-Busch,* supra, in which an identical argument was rejected. His argument also overlooks the definition of a labor dispute as contained in Section 152(9) of the National Labor Relations Act which is as follows:

> "The term labor, dispute includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee."

The Supreme Court of Missouri fully recognized Petitioner's failure to recognize and understand the holdings of this court and the statutes involved and correctly applied the law in complete harmony with the decisions of this court. Since the decision of the Supreme Court of Missouri sought to be reviewed neither decided a federal

question of substance not heretofore determined by this Court, nor decided such a question in a way probably not in accord with applicable decisions of this court within the meaning of Rule 19(a) of this Court, the present petition is quite obviously without merit.

## CONCLUSION

For the reasons above stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

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vs.

PLUMBERS LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, et al.,
*Respondents.*

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

Respondents have undertaken to re-frame petitioner's statement of the questions presented by this petition for certiorari, and to re-state the facts. In so doing, Respondents have wholly ignored the record, in at least two particulars. In order that the Court may have the actual record, petitioner, pursuant to Rule 21 of the Rules of this Court, is requesting the clerk of the Supreme Court of Missouri to certify and transmit to this Court, at this time, the pertinent parts of the record on the matters involved.

Repeatedly, Respondents charge that petitioner maintains "substandard wages and working conditions". They

notified petitioner by letter (Exhibit 16, Orig. Rec. 2nd Tr. 68) that they had been advised that petitioner was "not paying your employees the *wages*" which they claim they have established in the area.

The fact is that petitioner paid (as his District 50 contract provided) $4.39 per hour as against $4.20 per hour paid under Plumbers Local No. 8 contracts, and as against the same rate of $4.20 as determined by the Missouri Industrial Commission to be the prevailing rate. (Orig. Rec. 1st Tr. 81-83) (See also, Plff's Ex. 1, the union contract between petitioner and District 50, and p. 17 thereof; Plff's Ex. 2 and Plff's Ex. 4; testimony at pp. 15 to 18 Orig. Rec. 1st Tr.; testimony Orig. Rec. 2nd Tr. pp. 48 to 51; and testimony Orig. Rec. 2nd Tr. 65.)

It thus appears that the wages paid by petitioner were *higher* than those paid to defendant Local No. 8's members and higher than the prevailing wages established by the Industrial Commission. While there were some differences with respect to the so-called "fringe benefits", the District 50 contract was negotiated on the theory that its members preferred greater take home pay, and the right to provide, out of that greater pay, their own welfare plans.

Related to the failure of Respondents to stay within the record on the issue of "substandard" wages, is Respondents' departure from the record by misquoting the District 50 contract in the footnote appearing at page 3 of Respondents' brief. Respondent has added, in two places, the clause "and/or fringe benefits;" but the contract itself *contains no such phrase.* Even the reference citation to the contract provision as appearing in Article V, Section 3 of Exhibit No. 1 is wrong. Article V relates only to Management Rights. Article IX relates to wages; and Section 2 thereof (page 9 of Exhibit 1) merely provides that the employer shall conform to *wage increases* in the indus-

try made after the contract was drawn, by paying such increased wages after letter notice from the Union (meaning, of course, District 50). That original contract will be among the parts of the record to be transmitted to the Court by the clerk of the court below under Rule 21. And the paragraph in question is set out in the footnote below.[1]

Finally, on the point here involved, Respondents again depart from the record in the statement at page 4 of their brief that "Although Petitioner repeatedly asserts in his brief that his employees received greater take home pay he ignores entirely the contrary evidence by his employees." The reference to "his employees" is to the testimony of two disgruntled ex-employees Ted Grigsby (Orig. Rec. 2nd Tr. pp. 71 to 78), and Duke Woods. (Orig. Rec. 2nd Tr. pp. 78 to 84)

There is *not a word of testimony* from either of these ex-employees *as to take home pay.* Their testimony was in answer to leading questions as to fringe benefits, and the false claim that they did not receive overtime pay. Their testimony is discredited by the fact that they never made any complaint, either to petitioner, or to their union, with

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1. Section 2 of Article IX of the District 50 contract reads as follows: "In the event a wage increase is granted or given during the period of this Agreement to the organized workers in the Greater Kansas City area engaged in the crafts, trades or classifications listed in Appendix "A" of this Agreement, then such wage shall be given and granted by the Employer to the Employees covered under this Agreement thirty (30) days after the effective date of such increase or the date of notice by letter to the Council from the Union, whichever is later; however, in no event shall such increase result in the Employer's paying the Employees covered by this Agreement any amount in excess of the amount paid to the workers in the Greater Kansas City Area engaged in the crafts, trades or classifications listed in Appendix "A" of this Agreement."

respect to non-payment of overtime, or anything else; that they never invoked the grievance proceedings provided for by their union contract; that they never complained to anybody at all (Orig. Rec. 2nd Tr. 84); and finally, that *they kept their own time records!* (Orig. Rec. 2nd Tr. 86).

Respondents' use of the word "accepted" in referring to the charge presented to the Regional Director of the NLRB before this suit was filed is both inaccurate and misleading. Respondent would make it appear that the Director "accepted" the charge; that is, that he *assumed jurisdiction* over it. Actually, as shown by the Regional Director's letter of October 31, 1963, which was originally offered in evidence in connection with depositions and there marked as Deft's Ex. 2, and is later incorporated in the final record as Defendant's Exhibit 2 (Orig. Rec. 2nd Tr. 45) states that because there is insufficient evidence that the charged party's picketing was for an object proscribed by Section 8(b)(7) of the Act, "I am therefore refusing to issue a complaint in this matter." In other words, the Regional Director by refusing to issue a complaint, in effect, refused to take jurisdiction. It is, however, wholly beside the point to say that the Regional Director undertook to assume jurisdiction, because, as has been shown (Pet. for Cert. 16, et seq.) unless the facts upon which its jurisdiction must rest actually exist, and the Board's findings thereof disclose their existence, no action on the part of the Regional Director, or even on the part of the petitioner, could confer jurisdiction where none, in fact, exists.

In this connection, it will be noted that Respondents' brief makes no attempt to answer the point here involved, which is fully covered in the Petition for Certiorari (pp. 16 to 19), but entirely ignored in Respondents' brief.

Respondents have also entirely ignored the fact that, in this case, there was no legitimate labor dispute; hence no jurisdiction in the NLRB. That tribunal is one of limited jurisdiction, empowered by the Act of Congress to deal with matters of controversy with respect to labor disputes affecting interstate commerce. In dealing with that issue we have already pointed out that, in order to create jurisdiction in the NLRB there must not only be an adverse effect in interstate commerce, but the matter must also deal with a legitimate labor dispute.

In all of the cases relied upon by Respondents, the fact that a labor dispute was involved abundantly appears. That was true in Garner, Weber, Garmon, and also in Ariadne.[2] In all of those cases, the existence of a labor dispute was shown to exist; hence, as was said in Garmon and in Ariadne, it was "arguably" present; and, as was said in Garner and in Weber it was "reasonably" present. There is no difference, in principle, between what is "arguable" and what is "reasonable".

With respect to Ariadne, there can be no question but that a labor dispute was involved. There, the Union was attempting to force union status on the longshoremen; who, obviously, were not already under union contract with any other union. It was, therefore, a legitimate union objective to bring such workmen into the fold of organized labor.

That is a far cry from the situation existing in the case at bar. Here, petitioner's workmen were already well represented by a duly accredited labor union, recognized by the NLRB as the exclusive bargaining agent. Here, the claim that their wages and working conditions were

2. *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468; *Building Trades* v. *Garmon*, 359 U.S. 236; *ILA Local 1264* v. *Ariadne Shipping Co.*, 397 U.S. 195.

"substandard", is wholly false. Here, the wages—the "standards" set for petitioner's employees—had been established by the labor union of which they were members. Here, the standards so set by their exclusive bargaining agent, brought them *higher* wages than they would have received if they had been members of defendant union. Here, the defendant union did not have the right to set "standards", because that right belonged to another union —a union duly recognized by the NLRB. Here, the petitioner was powerless to negotiate with the defendant union, because he was bound by a contract giving to the District Fifty union that exclusive right. Here, if Petitioner had acceded to defendant union's demands, he would have been guilty of an unfair labor practice. None of these conditions were present in Ariadne.

In short, the finding of the trial court, on undisputed evidence that the picketing was "unlawful and in violation of plaintiff's rights * * * and that all of such acts constituted a malicious interference with plaintiff's business" (Orig. Rec. 2nd Tr. 89) discloses that the *real purpose* of the picketing was *not* to establish a legitimate labor claim, but was intentional, arbitrary and malicious, and for the purpose of destroying Petitioner's business. A legitimate labor dispute is not cut from that kind of cloth. It was not, and should not be held to be, the intent of Congress in the enactment of the National Labor Relations Act, to provide a haven for the conduct of union organizations having no legitimate labor objective, and designed to destroy an employer's business; and thus deny such an employer access to a Court of general jurisdiction for the redress of wrongs intentionally, wilfully and maliciously committed, merely because the wrongdoer happens to be a labor organization.

We respectfully submit that the Petition for Certiorari should be granted.

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